IN THE

Supreme Court of the United States

October Term, 1979

No. .....

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

vs.

JOHN C. RISJORD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

I.

Certiorari Is Required to Resolve a Conflict Among the Circuits as to the Appealability of an Order Denying Disqualification 7

II.

The Court Below Displayed an Insensitivity to a Basic but Potentially Recurring Form of Conflict Requiring the Exercise of This Court's Supervisory Jurisdiction 12

Conclusion 19

Appendix A. Second Pretrial Order .....App. p. 1

Appendix B. Opinion of the Court of Appeals 7

Judgment 11

TABLE OF AUTHORITIES CITED

Cases	Page
Arkansas v. Dean Foods Products Co., Inc., 605 F.2d 380 (8th Cir. 1979)	6, 8, 10, 11
Cannova Enterprises, Inc., etc. v. Home Insurance Company, et al., Western District of Missouri	4
Central Milk Products Cooperative v. Sentry Food Stores, Inc., 573 F.2d 988 (8th Cir. 1978)	6, 8
Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976)	5, 16
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	2, 7, 9
Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (D.C.Cir. 1976)	7
Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), clarified, 370 F.2d 418 (9th Cir. 1966)	7
Desist v. United States, 394 U.S. 244 (1969)	11
Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977)	6, 8, 10
Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975)	7
Griffiths, In re, 413 U.S. 717 (1973)	14
Holloway v. Arkansas, 435 U.S. 475 (1978)	18
I.B.M. Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978)	4, 5
Kelly v. Greason, Matter of, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968)	15
Kroungold v. Triester, 521 F.2d 763 (3d Cir. 1975)	7
MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395 (4th Cir. 1977)	7

Page

Meat Price Investigators Association v. Spencer Foods, Inc., 572 F.2d 163 (8th Cir. 1978) 6, 8

Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) 7

Muskrat v. United States, 219 U.S. 346 (1911) 11

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) 7, 9, 10

Stovall v. Denno, 388 U.S. 293 (1967) 11

Tomerlin v. Canadian Indemnity Co., 61 Cal.2d 638, 39 Cal.Rptr. 731, 394 P.2d 571 (1964) 17, 18

Uniweld Products, Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967) 7

Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) 7

Canons

Canons of the American Bar Association, Canon 5 14

Canons of the American Bar Association, Canon 9 14

Rules

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105 (Missouri Version) 13, 14, 15, 16

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(C) 14, 15, 16

Page

Federal Local Court Rules (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), N.D. Ala., Local Rule 7, Alabama, p. 6 14

1 Federal Local Court Rules (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), M.D. Ala., Local Rule of Court Concerning Oath of Attorneys Upon Their Admission to Practice, Alabama, p. 2a 14

1 Federal Local Court Rules (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), N.D. Ill., Local Rules 6(a)(i), 8(3), Illinois, pp. 54-55 14

1 and 2 Federal Local Rules (Pike & Fischer, Inc., ed., Callaghan & Co. 1979) 13

Statutes

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1291 .....2, 7

United States Code, Title 28, Sec. 1332(a) 3

United States Constitution, Art. III 11

Textbook

Comment: The Insurer's Duty to Defend Under a Liability Insurance Policy, 114 Univ.Pa.L. Rev., p. 734 (1966) 17, 18

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vs.

JOHN C. RISJORD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner THE FIRESTONE TIRE & RUBBER COMPANY prays that a writ of certiorari issue to review the judgment *en banc* of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on January 7, 1980.

Opinions Below.

The "opinion" of United States District Judge William R. Colinson (Western District of Missouri) on Firestone's Motion to Disqualify Attorney John C. Risjord and the Risjord firm (being a portion of the Second Pretrial Order) is unreported and appears at

Appendix A.[1] The opinion of the Court of Appeals is as yet unreported and appears at Appendix B, together with the judgment as entered showing the date of entry.

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 7, 1980 (App. B, p. 11). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Is an order denying a motion to disqualify counsel a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. §1291 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (a basic question on which the courts of appeal are sharply divided)? (See Point I, *infra*).

2. In sanctioning the simultaneous representation by attorney Risjord of both the plaintiffs and the insurer of defendant Firestone, over Firestone's objections, did the court below err by permitting a patent and potentially recurring form of conflict, requiring corrective action by the exercise of this Court's supervisory jurisdiction? (See Point II, *infra*).

Statute Involved.

United States Code, Title 28 §1291.

"*Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of

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[1]The order in question was included as a discrete order in the United States District Court's Second Pretrial Order (R., p. 297).

the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Statement of the Case.

This proceeding involves a motion to disqualify counsel arising in the context of multi-district proceedings. Jurisdiction of the court of first instance (the United States District Court for the Western District of Missouri) in the multi-district proceedings ultimately rests on diversity grounds. 28 U.S.C. §1332(a).

John C. Risjord and the Risjord firm[2] are attorneys for certain plaintiffs (the Risjord Plaintiffs) who have sued Firestone, seeking damages for personal injuries[3] (R. pp. 324, 338, 351). Risjord and the Risjord firm also have a long-standing relationship as attorneys for The Home Insurance Company, which insures Firestone against the claims of the Risjord Plaintiffs (R. pp. 117, 136; 289-290). The Risjord-Home relationship extends over a period of some twenty years, during which Risjord and the Risjord firm have represented

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[2]In the present Petition, we shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to Niewald, Risjord & Waldeck, the law firm of which he is a member, as the "Risjord firm"; to appellant The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs". Record references (designated "R., p. ....." or "Risjord Dep., p. .....") are to the Record in the Court of Appeals. Appendix references (designated "App. ....., p. .....") are to the appendices to this Petition.

[3]The suits of the Risjord Plaintiffs are part of multidistrict litigation involving a number of personal injury actions which have been brought against various manufacturers of multi-piece rims or components thereof, including Firestone.

Home in a number of matters[4] and consistently held Home out to the public[5] as their foremost insurance client (Risjord Dep., pp. 100-101, 119-120, Exh. 32; R. p. 64).

In framing his complaints against Firestone, Risjord included a highly unusual theory of "intentional tort", whereupon his client Home served "reservation of rights" letters upon Firestone, disclaiming coverage for such "intentional tort" claims under its liability policy (R. pp. 119, 121, 324, 338, 351).

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[4]In his deposition, Risjord at one point testified as follows:

"Q How long has your firm represented the Home Insurance Company?

"A The Home Insurance Company, my understanding, was a fire insurance company. We represented the Home Insurance Company—Fire Insurance Company—periodically, probably as long as I have practiced law." (Risjord Dep. p. 101).

[5]At the time of the trial court's order denying Firestone's motion to disqualify, Risjord and his firm were counsel of record for Home in one such case entitled *Cannova Enterprises, Inc., etc. v. Home Insurance Company, et al.*, pending in the Western District of Missouri (Risjord Dep. p. 118). Pending Firestone's appeal, Home purported to discharge Risjord in *Cannova* (R. p. 437). Since the Court of Appeals does not even mention that fact, let alone rely on it, we need not discuss it at length here. Risjord's purported divorcement from *Cannova* is by no means complete; Risjord remains as counsel for the other defendants in *Cannova*, in which role he is still in a position to serve Home's interests in that case (R. p. 437). Viewed in terms of an "appearance of impropriety", the "withdrawal" is more cosmetic than real. But even assuming, *arguendo*, that Risjord were totally divorced from *Cannova* (which is not the fact), that would not be a meaningful cure, since the relationship between Risjord and Home is deeply rooted and far transcends Risjord's involvement in *Cannova*. See *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978). Nor would Risjord be unaware that his firm's potential future business with its longstanding client, Home, might well depend on the extent his actions tended to aid or hinder Home's efforts (hereafter described) to defeat coverage on the claims of the Risjord Plaintiffs.

itself attests to its significance. Finally, the fact that the underlying disqualification issues are of basic concern to the administration of justice underscores the need for a consistent approach. While we believe the considerations favoring appealability to be the more persuasive, at the very least the question ought to be addressed and put to rest by this Court.

Third, we submit that in adopting a rule of non-appealability[11] the decision below not only runs counter to the letter and spirit of the *Cohen* doctrine (the prerequisites of which are satisfied by orders of the type in question) but also does violence to two cardinal policy concerns, both vital to public confidence in the administration of justice; the need for more (not less) emphasis upon the propriety of attorney conduct, and the need to achieve greater efficiency by "nipping in the bud" a potentially tainted proceeding. As aptly stated in the leading case of *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra,* 496 F.2d 800 at 805:

> ". . . Now in 1974 we believe that *Cohen* requires a return to the wisdom of *Harmar* [Drive-In Theatre v. Warner Bros. Pictures, 239 F.2d 555 (2d Cir., 1956)] and so we uphold the appealability of an order denying disqualification, just as we have long upheld the appealability of an order granting this. There is no sufficient basis for distinguishing between the two. In both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief.

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[11]The court below states that orders *granting* motions to disqualify will continue to be treated as appealable collateral orders under *Cohen.*

> "It would seem to be appropriate at this time to dispel the needless uncertainty as to the law and procedure relating to the appealability of disqualification orders. All three prerequisites of *Cohen* are met. Since this is so, there is no reason not to follow the mandate of the Supreme Court and adopt their decision, namely:
>
> > We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.
>
> 337 U.S. at 547.
>
> By holding such an order directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to § 1292(b) and/or § 1651. Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?"

One further point should be noted. Having held that an order denying disqualification would no longer be regarded as appealable, the Court of Appeals nevertheless purported to address the merits of Firestone's appeal from the trial court's order refusing to disqualify attorney John Risjord. But given the court's *en banc* holding on the question of appealability, it was hardly surprising that the court's "consideration" of the merits was perfunctory and *pro forma*, consisting in essence of a single sentence,[12] with the court not even permit-

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[12]The Court of Appeals' entire "discussion" of the merits consists of the following: "In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean*

ting oral argument, let alone addressing in a meaningful way the facts and issues briefed by the parties. Indeed, having concluded that refusals to disqualify counsel no longer would be deemed worthy of appeal, the Court of Appeals hardly could have reversed the trial court in the case at bar, for to do so would have undermined the appellate court's position in declining to entertain such appeals in the future.

Moreover, having held that orders such as that appealed from were nonappealable, the court was effectively foreclosed by procedural considerations from devoting any real attention to the merits. To turn to the merits in a meaningful way would have suggested that what the court labeled as a holding on nonappealability was advisory only, not binding on the court, future litigants, or even the litigants before it. This, in turn, would have placed the court at odds with the Constitutional proscription against advisory opinions (see *Muskrat v. United States*, 219 U.S. 346 (1911)) and the related doctrine (grounded in the "case or controversy" requirement of Article III of the Constitution) that even a prospective ruling (in this case, a ruling of nonappealability) must apply to the litigants actually before the court. See, e.g., *Desist v. United States*, 394 U.S. 244, 254-255 note 24 (1969); *Stovall v. Denno*, 388 U.S. 293, 301 (1967). In short, Firestone has not really had its day in court on the merits.

Foods to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings." (App. B, p. 10).

II.

The Court Below Displayed an Insensitivity to a Basic but Potentially Recurring Form of Conflict Requiring the Exercise of This Court's Supervisory Jurisdiction.

The record below reflects (essentially without contradiction) that attorney John Risjord and his firm, who represent the plaintiffs in certain product liability (wheel and rim) cases against Firestone, also have a long-standing relationship as attorneys for Firestone's product liability insurer (The Home Insurance Company) which the Risjord firm holds out as its foremost insurance client (R. pp. 64, 117, 136, 285-290, Risjord Dep. pp. 100-101, 119-120, Exh. 32). Based on an "intentional tort" theory espoused by Risjord, Home disclaimed coverage under its policy. (R. pp. 119-121). Firestone, voicing concern that Risjord's management of the cases inevitably would be colored (consciously or unconsciously) by his awareness of Home's interest (as insurer of those very claims) in defeating coverage, moved to disqualify Risjord, noting that the conflict inherent in Risjord's position was detrimental both to Firestone and the plaintiffs to whom Risjord owed a duty of undivided loyalty.

The trial court, while finding that the resulting conflict was likely to adversely affect Risjord's exercise of his independent judgment (App. A, p. 4; R. p. 292), nevertheless held that Risjord might remain in the cases provided he obtained the consent of Home (which stood to benefit by the very conflict complained of) and the Risjord plaintiffs (who were hardly of sufficient sophistication to appreciate the conflict), irrespective of any objection interposed by Firestone. The Court of Appeals, without addressing the facts (essentially undis-

puted) in any meaningful detail, purported to uphold the trial court's action as a permissible exercise of discretion (App. B, p. 10).

We believe that this not only has resulted in a grave injustice to Firestone, but that it poses a question worthy of consideration by this Court.

The trial court itself took pains to endorse Firestone's appeal and the substantiality of the question it poses (App. A, p. 5; R. p. 292).

Beyond this, the disciplinary rule applied below (Disciplinary Rule ("DR") 5-105,[13] derived from the Code of Professional Responsibility of the American Bar Association ("ABA Code")), is in widespread use throughout the Federal judiciary as well as most of the States. 1 and 2 *Federal Local Court Rules* (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), *passim*

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[13]DR5-105 (*i.e.*, the Missouri version (adopted in the Western District), which omitted some additional language found in the ABA Code) provides:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

(hereinafter "Federal Local Rules");[14] *In re Griffiths*, 413 U.S. 717, 727 note 19 (1973) ("The ABA Code of Professional Responsibility has since [1970] been approved and adopted in the District of Columbia and in 46 States . . ."). Its proper application is therefore a matter of general importance. This is particularly true in the insurance context, where the Rule helps to obviate the everpresent danger (hereafter discussed) that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit.

In essence, DR5-105 precludes an attorney from accepting or continuing employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client," (except to the limited extent permitted under the consent provisions of DR5-105(C)). The Rule is in furtherance of the policy articulated in Canon 5 of the ABA Code, that "a lawyer should exercise independent professional judgment on behalf of a client", and the mandate of Canon 9 that "a lawyer should avoid even the appearance of professional impropriety".

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[14]See, *e.g.*, M.D. Ala., Local Rule of Court Concerning Oath of Attorneys Upon Their Admission to Practice (adopting Canons of the ABA and Code of Ethics of the Alabama State Bar Association), 1 *Federal Local Rules* at Ala., p. 2a; N.D. Ill., Local Rule 6(a)(i) (attorney for admission must certify that he has read the Canons of Ethics of the ABA and "will faithfully adhere thereto"; Local Rule 8(3) (discipline of attorneys who fail "to abide by the provisions of the Canons of Ethics of the American Bar Association"), 1 *Federal Local Rules* at Ill. pp. 54-55.

Even districts which do not adopt the Code directly may do so indirectly by requiring attorneys practicing before them to be members of a state bar which has adopted the Code. See, *e.g.*, N.D. Ala., Local Rule 7, *Federal Local Rules*, at Ala., p. 6.

In view of the vital need to preserve and strengthen public confidence in the Bar, any construction of the Rule which threatens to undermine its underlying purposes must be viewed as cause for concern. At the very least, given the need to resolve the basic procedural conflict discussed at Point I, the merits of the substantive controversy are worthy of ancillary consideration, and particularly so inasmuch as the basic facts are essentially undisputed and the trial court itself found a likelihood that the exercise of Risjord's independent professional judgment would be adversely affected by his dual representations. Insofar as the courts below failed to address the full implications of that finding or to take meaningful corrective action, the task remaining is one which this Court readily can and ought to assume.

The basic fallacy in the approach of the lower courts stems from a misapplication of a carefully drawn exception to the general doctrine of DR5-105, whereby informed consent by all affected interests may obviate a conflict where it is "obvious" that the challenged attorney can adequately represent the various interests involved and all affected interests join in the consent. DR5-105(C). This "consent" provision plainly is not designed to sanction situations involving "such delicate conflicting relationships and inescapable divided loyalties" as are here present. As noted in *Matter of Kelly v. Greason*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) (from which the quoted phrases are taken), in such cases "the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct. Where divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally

to the client, or the appearance of misconduct will be unavoidable [citing cases]. Moreover, the unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him (*Matter of Young,* 188 App.Div. 538, 542-544, 177 N.Y.S. 259, 261-63)."

Nor could any viable "consent" approach be taken in any event without providing for the consent of *all* affected parties, including Firestone. Pertinent here is the following observation in *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F.2d 1384 (2d Cir. 1976): "*Putting it as mildly as we can,* we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge *and* consent of *all* concerned." (Emphasis added). 528 F.2d 1384, 1386 (2d Cir. 1976). Even assuming, *arguendo,* that Home and the individual plaintiffs consented, Firestone has *not* consented. Therefore, Risjord has not secured and cannot possibly secure the "consent of *all* concerned".

By disregarding these principles, the lower courts have in effect used the "consent" provision of DR5-105 (C) to emasculate the main thrust of DR5-105 and the fundamental ethical principles it embodies. While the adverse effects of that emasculation far transcend the insurance context, their destructive effect in the insurance context is itself cause for general concern, as the present case amply demonstrates.

It is inherently impossible for one in Risjord's position to exercise the independence of judgment which an attorney's duty of undivided loyalty demands, Risjord's tactical and strategic choices in prosecuting the claims of the Risjord Plaintiffs (*e.g.,* in deciding wheth-

er and if so how aggressively to pursue his "intentional tort" theory) cannot be divorced from his awareness that his actions may impinge on the success or failure of his long-standing client, Home, in avoiding liability under the Firestone policy.

Even if Risjord's "intentional tort" theory were not consciously conceived with Home's interests in mind, in determining whether and to what extent to pursue it, his independence of judgment must inevitably be clouded by his awareness that such a theory is helpful (and its abandonment harmful) to his client Home. In the face of that awareness, Risjord cannot assess the tactical and strategic "pros" and "cons" of such a theory (*e.g.*, whether it may appear so far-fetched as to weaken the balance of the Risjord Plaintiffs' cases in the eyes of the jury) with the degree of independence which his duty of undivided loyalty demands. *A fortiori,* how can it be said that Risjord's conduct has not created an "appearance of impropriety" which can be dispelled only by his disqualification?

Nor are the concerns voiced by Firestone novel or unique. The courts have taken note of the danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit. See, *e.g., Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638, 647, 39 Cal.Rptr. 731, 394 P.2d 571 (1964) ("in cases involving multiple claims against the insured, some of which fall within the policy coverage and some of which do not, the insurer may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely upon the insured". (footnote omitted). See also *Comment: The Insurer's Duty to Defend Under a Liability Insurance Policy,* 114 Univ.Pa.L. Rev. 734, 736 (1966), noting "the

insurer's natural tendency to confine the third party's action to claims outside of coverage as soon as possible, even at the expense of the insured's interests."

While *Tomerlin* involved an insurer-linked attorney engaged to represent an insured defendant, the danger is no less real when such counsel purport to represent a plaintiff. Indeed, the risks are compounded, due to the greater control exercised by plaintiff's counsel over the theory of the action, the fact that *two* interests (*i.e.*, the plaintiff and the defendant-insured) are placed in jeopardy, and the increased difficulty of assessing the attorney's motives in a context where breaches of loyalty are less likely to be flagrantly apparent. Indeed, the impossibility of detecting and policing the possible impact of the insurer's interests on subtle nuances of tactics and strategy renders the danger particularly serious in the plaintiff-attorney context. *Cf. Holloway v. Arkansas,* 435 U.S. 475, 491 (1978) (". . . to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.").

Moreover, in light of Home's fiduciary obligations to Firestone and Firestone's vital stake in the actual and potential consequences of the conflict, a "consent" approach which ignores Firestone's interests is not viable. At the very least, Firestone's consent or permission should be required as a precondition to any consent by Home, having in mind the risk that Home, notwithstanding its fiduciary duty not to take or permit any action respecting the conflict or its resolution which is or may appear to be detrimental to Firestone's interests, might choose to gamble on the conflict in the hope of benefiting at Firestone's expense. Indeed, Home's very willingness to consent to Risjord's dual

> fessional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

In *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978), the Third Circuit Court of Appeals interpreted an identical provision of the Code of Professional Responsibility of the District of New Jersey and applied that provision to a case that is indistinguishable from the facts of this case. That court stated:

> The rule [DR 5-105] does not define the nature or extent of the adverse effect contemplated on the attorney's exercise of independent judgment. However, DR 5-105(C) makes clear that situations entailing the likelihood of an adverse effect include circumstances in which such an effect may be minor permitting the performance of adequate services in spite of it. In those cases the multiple representation may take place if the attorney believes in good faith that he can adequately represent both clients and if the consent of the clients is obtained.

> We think, however, that it is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter. *See Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-1387 (2d Cir. 1976); *Grievance Committee of the Bar of Hartford County v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964); Advisory Committee on Professional Ethics of the Supreme Court of New Jersey, *Opinion* No. 282, 97 N.J.L.J. 362 (1974), and *Opinion* No. 301, 98 N.J.L.J. 209 (1975). For example, a possible effect on the quality of the attorney's services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter. *See Cinema 5, Ltd. v. Cinerama, Inc., supra* at 1387. A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney. The fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence, depending upon the facts and circumstances, at the time the decision was made to represent the client without having obtained his consent.

After consideration of the briefs submitted by Firestone and by Mr. Risjord, and after consideration of the facts to which they have stipulated, this Court, like the court in *IBM v. Levin, supra,* "think[s] . . . that it is likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the adversary posture toward

that client in another legal matter." *IBM v. Levin, supra* at 280. Accordingly, Mr. Risjord will, hereinafter, be directed to either comply with the consent requirement of DR 5-105(C) or terminate his representation of either the plaintiffs in the cases in which Firestone is a defendant or his representation of Home Insurance Company.

This Court is, however, of the opinion that this ruling on the disqualification of Mr. Risjord because of a conflict of interests involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this ruling may materially advance the ultimate termination of this litigation. This Court will, therefore, pursuant to 28 U.S.C. § 1292 (1976), certify this ruling for immediate appeal.

In addition, Firestone also argues that Mr. Risjord should be disqualified from further participation in this case because of an alleged violation of Local Rule 24. The allegations made in this argument raise questions of fact that will require an evidentiary hearing. A violation of Local Rule 24 would permit the imposition of some sanctions against Mr. Risjord, but the sanction of disqualification from further representation in this case would not be justified. Thus, since the relief requested by Firestone will not be granted even if the allegations of a violation of Local Rule 24 are true, a hearing on the questions of fact that are raised by Firestone's allegations will be deferred until a later date.

. . . .

[The omitted portions of the Second Pretrial Order relate to matters other than the order which is the subject of this Petition.]

IX.

The pending motions discussed above and those argued during the pretrial conference will be ruled without further discussion. It is, thus,

. . .

13) ORDERED that, on or before August 31, 1979, Mr. Risjord certify to this Court, by way of affidavit, that he has either met the consent requirement of DR 5-105 or terminated his representation of either Home Insurance Company or the plaintiffs in any suit against Firestone; and it is

14) ORDERED that this Court's ruling on the question of Mr. Risjord's disqualification because of a conflict of interests be, and hereby is, certified for immediate appeal pursuant to 28 U.S.C. § 1292 (1976).

/s/ W. R. Collinson
District Judge

Dated: August 16, 1979.

APPENDIX B.

United States Court of Appeals for the Eighth Circuit.

In re: Multi-Piece Rim Products Liability Litigation. Firestone Tire & Rubber Co., Appellant, v. John C. Risjord, Appellee. No. 79-1781.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 28, 1979.

Filed: January 7, 1980.

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges, sitting en banc.

LAY, Circuit Judge.

Personal injury claimants brought suit against the Firestone Rubber Co. and Firestone moved thereafter that claimant's counsel, John C. Risjord, and his law firm be disqualified from representing them because of an alleged conflict of interest with Firestone's insurer. The district court, the Hon. William R. Collinson presiding, ordered counsel Risjord to comply with the consent requirement of Disciplinary Rule 5-105 of the Code of Professional Responsibility of the Missouri Supreme Court or terminate his representation of either plaintiffs or the insurer.[1] Risjord thereafter complied with DR5-105(C) which required that Risjord receive consent

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[1]DR5-105(C) provides:

> In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

from the insurance carriers or terminate his representation in the suit. The district court ruled that Risjord had complied with his order and that Risjord should not be disqualified from the litigation. The district court further certified his ruling on the disqualification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Rather than obtain permission to appeal from this court, as required under section 1292(b), Firestone simply filed a notice of appeal. Risjord challenges the order as not being appealable since it is not a final order. The law in this circuit has been that an order denying a motion for disqualification of counsel is final under the collateral order doctrine recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 606-07 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979).

Recently, the Sixth Circuit overruled an earlier decision and held an order denying a motion for disqualification of counsel would no longer be appealable under the collateral order doctrine. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979). The Sixth Circuit stated:

> Motions to disqualify an opponent's counsel can easily be simply "disguised harrassment [sic]".
>
> . . . .
>
> A rule allowing interlocutory appeals here would provide litigants with yet another device by which to delay final determination on the merits, and would lead the court to divert its attention from the central issues in the case.

Id. at 295, (footnote omitted) (quoting in part *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027 (D.C. Cir. 1976)).

We have reconsidered *Weber* and *Dean Foods* and now agree with the position of the District of Columbia, Sixth and Ninth Circuits; it is the opinion of this court that *Weber* and *Dean Foods* should be and hereby are overruled.[2] *See generally,* Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts,* 45 U. Chicago L. Rev. 450 (1978).

In so holding we recognize there exists a fundamental distinction between a denial of a motion of disqualification of counsel and a grant of a motion for disqualification. In the latter case of disqualification we will still continue to apply the collateral order doctrine and recognize the order as appealable. We also concur with the Sixth Circuit's opinion, which allows for immediate review in the exceptional case where irreparable harm could occur by denial of an interlocutory appeal. The Sixth Circuit observed:

> We believe our position denying interlocutory appeal of orders refusing to disqualify counsel to be fully consonant with the Supreme Court's holding in *Cohen*. Although "collateral" to the main proceeding, an order denying a motion to disqualify does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment. In the exceptional case, where irreparable harm would indeed result, the movant may petition this court for a writ of mandamus under 28 U.S.C. § 1651 (1970),

[2]This opinion has been circulated to the court en banc, and all active judges concur.

> the All Writs Act. This approach will afford the court the flexibility necessary to prevent serious injustice while advising litigants of the court's extreme reluctance to depart from the final judgment rule.

Melamed v. ITT Continental Baking Co., 592 F.2d at 296 (quoting *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027-28 (D.C. Cir. 1976)).

In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean Foods* to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings.

IT IS SO ORDERED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Judgment.

United States Court of Appeals for the Eighth Circuit.

In Re: Multi-Piece Rim Products Liability Litigation Firestone Tire & Rubber Company, Appellant, vs. John C. Risjord, Appellee. No. 79-1781.

September Term, 1979.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be considered on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties without oral argument.

On consideration whereof, it is now here ordered and adjudged by this Court, that appellee's motion to dismiss is denied.

And it is further ordered that the said District Court's denial of the motion to disqualify is affirmed.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court.

January 7, 1980

Cost taxed in favor of appellee:

Cost of printing 10 copies of brief:	$553.64
Total costs of appellee for recovery from appellant in the U.S. District Court:	$553.64

[Entered January 7, 1980]

Order entered in accordance with opinion:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

Page

United States District Court for the Western District of Missouri, Western Division, on November 13, 1979 ..... A188

22. Firestone's Withdrawal of Its Motion for Order Holding John C. Risjord in Contempt, Filed in the United States District Court for the Western District of Missouri, Western Division, on November 30, 1979 ..... A194

23. Affidavit of John B. Carothers III, Filed in the United States District Court for the Western District of Missouri, Western Division, on December 6, 1979 ..... A197

24. Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit, Filed on January 7, 1980 ..... A200

25. Complaint in *Edward Campbell v. The Goodyear Tire & Rubber Company and FMC Corporation,* Case No. 79-0770-CV-W-2, Filed in the United States District Court for the District of Kansas on June 29, 1979 ..... A205

26. Complaint in *The Firestone Tire & Rubber Company v. The Home Insurance Company,* Case No. 79-0961-CV-W-1, and Relevant Portions of Exhibit A Thereto, Filed in the United States District Court for the Western District of Missouri, Western Division, on October 25, 1979 ..... A217

Relevant Docket Entries.

Entries from Docket in Case No. 79-0086-CV-W-2.

PLAINTIFFS	DEFENDANTS
RODRIGUEZ, LUCIANO, individually and as next friend of Rene Rodriguez.	FIRESTONE TIRE & RUBBER CO. (1) GOODYEAR TIRE & RUBBER CO. (2)

* * *

1979, Feb. 02 — MDL-362 - Transferred to Western District of Missouri, pursuant to Multidistrict Litigation Panel order. Case No. H-77-288 from the Southern District of Texas. GHM

* * *

Entries from Docket in Case No. 78-0266-CV-W-2.

PLAINTIFFS	DEFENDANTS
HALE, Larry HALE, Linda	FIRESTONE TIRE & RUBBER COMPANY

* * *

1978, Aug. 29 — COMPLAINT - with JS-44C — filed. (Two summonses issued and delivered to the U.S. Marshal). Plt. $15.00 SBN

* * *

Entries from Docket in Case No. 78-0408-CV-W-1.

PLAINTIFFS	DEFENDANTS
GOODWIN, Bobby Craig, GOODWIN, Carolyn Marie, GOODWIN, Melissa Darlene and GOODWIN, Kathy Diane, Minors, by and through their Natural Mother and Next Friend, PERKINS, Edna Goodwin and PERKINS,	1. THE FIRESTONE TIRE & RUBBER COMPANY and 2. THE GOODYEAR TIRE & RUBBER COMPANY

EDNA GOODWIN, individually

* * *

1978, June 5 — COMPLAINT — with JS-44c — filed. (Two Summonses issued and delivered to the U.S. Marshal). $15.00 Plt. SBN

* * *

Entries from Docket in Case No. 78-0647-CV-W-2.

PLAINTIFFS	DEFENDANTS
BUTLER, JOSEPH WILLIE	1 FIRESTONE TIRE AND RUBBER COMPANY and 2 THE GOODYEAR TIRE AND RUBBER COMPANY

* * *

1978 Apr 20 — COMPLAINT - with JS-44c, filed. (One summons issued and delivered to U.S. Marshal.) Plt. $15.00 BB

* * *

Entries from Docket in M.D.L. No. 362.

PLAINTIFFS	DEFENDANTS
M.D.L. No. 362 In re: MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION	MDL No. 362

* * *

DATE	NR	PROCEEDINGS

1979 Jan 22 — 1. OPINION and Order from the MDL Panel transferring cases to the Western District of Missouri, filed. HCL.

STYLE	FORMER NUMBER	NUMBER ASSIGNED
McGee, et al v. Goodyear et al	CA78-P0090S	79-0078-CV-W-2
Clayton, et al v. Firestone et al	CA78-G0396S	79-0091-CV-W-2
Henderson, et al v. Firestone	C78-0002-BG	79-0165-CV-W-2
Barry v. Firestone	77-2796-G	79-0174-CV-W-2
Lantieri, et al v. Goodyear	Y78-1469	79-0083-CV-W-2
Olsen v. Goodyear	77-0197-HEC	79-0111-CV-W-2
Dupuis v. Firestone	C-76-321	79-0088-CV-W-1
Davis, et al., v. Firestone	C-78-2182	79-0064-CV-W-2
Brown etc, v. Goodyear	CA3-78-0556-D	79-0071-CV-W-2
Rodriguez, etc v. Firestone	H-77-288	79-0086-CV-W-2
(Consol.	77-1789	
Walker v. Chemical Leaman Tank Lines	76-0350CH	79-0081-CV-W-2
Mawby v. Firestone	870616	79-0122-CV-W-2
Johnson v. Firestone	871602	79-0161-CV-W-2
WITHIN THE WESTERN DISTRICT.		
Hale, et al v. Firestone	78-0266-CV-W-2	
Goodwin, et al v. Firestone	78-0408-CV-W-2	
Butler v. Firestone	78-0647-CV-W-2	
Walker et al v. Firestone	75CV363-W-2	

* * *

Apr. 23 — 40. — FIRST - Pretrial Order-filed, mailed. cm

* * *

Apr. 26 — 43. — DEPOSITION - Of John Risjord, taken April 16, 1979 - filed. (Firestone pd. $57.00) cm

* * *

May 24 — 72. — MOTION - of the Firestone Tire & Rubber Company to disqualify John C. Risjord with brief and suggestions and supporting affidavits, filed. HL

* * *

Jun. 18 — 92. — BRIEF - And suggestions in opposition to the motion of Firestone Tire & Rubber Company to disqualify John C. Risjord - filed. cm

* * *

July 03 — 113. — SUPPLEMENTAL - suggestions in support of Firestone's motion to disqualify, filed. HL

* * *

July 16 — 123. — DEPOSITION - Continued deposition of JOHN RISJORD, taken by the defendants, filed $_____ HL

* * *

Aug. 16 — 153. — SECOND - Pretrial Order, filed, mailed to liaison counsel. HL

* * *

Aug. 20 — 155. — TRANSCRIPT - of proceedings on August 10, 1979, filed. HL

* * *

Aug. 24 — 158. — TRANSFER - conditional transfer order from MDL Panle, filed. (Two attested copies mailed to the District of Kansas.) HL
Transferring Edward Compbell vs. The Goodyear Tire & Rubber Company C. A. No. 79-1314 and assigned No. 79-0770-CV-W-2 HL

* * *

Aug. 28 — 182. — PLAINTIFFS - report to the Court concerning purported conflict of John C. Risjord.

* * *

Sep. 11 — 197. — NOTICE - Of Appeal, filed. (Defendant Firestone from Second Pretrial Order No. 2.) yw

* * *

Oct. 5 — 242. — MOTION - and request for oral argument

of the Firestone Tire & Rubber Co., regarding contempt of John C. Risjord, with brief & suggestions in support.

* * *

Nov. 13 — 409. — BRIEF - Supplementary Brief and Response of John C. Risjord in Opposition to the Motion and Request for Oral Argument of the Firestone Tire & Rubber Co Regarding Contempt of John C. Risjord and the Motion of Firestone for Disqualification. rar

* * *

Nov. 30 — 456. — WITHDRAWAL - Firestone's Withdrawal of its Motion for Order Holding John C. Risjord in Contempt.) rar

* * *

Dec. 6 — 484. — AFFIDAVIT - of John B Carothers III. rar

* * *

Complaint.

In the United States District Court for the Southern District of Texas, Houston Division.

Luciano Rodriguez individually and as next friend of Rene Rodriguez, Plaintiffs, vs. Firestone Tire & Rubber Company and the Goodyear Tire & Rubber Company, Defendants. Civil Action No. H-77-288.

Filed Feb. 22, 1977.

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES LUCIANO RODRIGUEZ, Individually and as Next Friend of RENE RODRIGUEZ, hereinafter called Plaintiffs, and make and file this their Complaint, complaining of FIRESTONE TIRE & RUBBER COMPANY and THE GOODYEAR TIRE & RUBBER COMPANY, hereinafter called Defendants, and for cause of action would respectfully show unto the Court and Jury the following:

I.

Plaintiffs are both residents of Bee County, Texas. Defendant, Firestone Tire & Rubber Company, is a foreign corporation licensed to do business in the State of Texas and whose registered agent for service is C T Corporation System, Republic National Bank Building, Dallas, Texas.

Defendant, The Goodyear Tire & Rubber Company, is a foreign corporation licensed to do business in the State of Texas and whose registered agent for service is C T Corporation System, Republic National Bank Building, Dallas, Texas.

Jurisdiction of this cause is based upon diversity of citizenship between the parties, the amount in controversy exceeds Ten Thousand and No/100's ($10,000.00) Dollars and is conferred upon this Court by 28 U.S.C. Sec. 1332.

II.

This suit is brought by the Plaintiffs for the purpose of recovering damages from the Defendants for serious personal injuries sustained by Rene Rodriguez as the result of a defective and dangerous truck tire rim and tire which were designed, produced, marketed, distributed and sold by the above mentioned Defendants and for failure to provide proper warnings for the users and consumers of said rim and tire.

III.

At all times germane to this lawsuit, Defendant, Firestone Tire & Rubber Company, was a corporation engaged in the design, manufacture, distribution and sale of truck rims, particularly the truck tire rim which is the subject of this lawsuit, further described as a tandem axle split rim. Some time prior to September 23, 1975, Defendant, Firestone Tire & Rubber Company, designed, manufactured, distributed and sold the above described split rim, and introduced said split rim into the stream of commerce, where it ultimately came into the hands of the Plaintiffs herein.

IV.

At all times germane to this lawsuit, Defendant, The Goodyear Tire & Rubber Company was a corporation engaged in the design, manufacture, distribution and sale of truck tires, particularly the truck tire involved in and made the basis of this lawsuit. The tire manufactured by The Goodyear Tire & Rubber Company was mounted upon the split rim manufactured by the Defendant, Firestone Tire & Rubber Company, at the time of the accident made the basis of this suit. Some time prior to September 23, 1975, Defendant, The Goodyear Tire & Rubber Company, designed, manufactured, distributed and sold the above de-

scribed tire, and introduced it into the stream of commerce wherein it ultimately came into the possession of the Plaintiffs herein.

V.

Thereafter, on or about September 23, 1975, while the Plaintiff, Rene Rodriguez, was in the process of airing up the tire mounted upon the rim involved in this suit, said rim blew apart and struck the Plaintiff in the head and body resulting in serious injuries to the Plaintiff which will be set out more fully herein.

VI.

Plaintiffs would show that the tire and rim were being used for the purpose and in the manner in which they were intended by the Defendants to be used, and were being used in a manner foreseeable to the Defendants at the time of the accident on or about September 23, 1975. Plaintiffs would also show that the split rim manufactured by the Defendant, Firestone Tire & Rubber Company and the tire manufactured by The Goodyear Tire & Rubber Company were dangerous and defective at the time they left the hands of the Defendants and at all times thereafter. Said split rim and tire were unfit for their intended use as a tire and rim on a tandem truck, which created an unreasonable risk of harm to the ultimate user, or users, of said split rim and tire. The split rim was dangerous and defective in that the rim was of a defective, improper and unsafe design, was capable of flying apart while in the process of filling up a tire with air, and would not adequately lock up and remain in one piece while a tire was being filled with air. As a result of this dangerous and defective condition and design which exposed the ultimate users to an unreasonable risk of harm, Plaintiffs were caused to suffer the injuries more particularly alleged herein, and said defective condition and design was a producing

cause of the injuries and damages suffered by the Plaintiffs herein. The tire manufactured by the Goodyear Tire & Rubber Company was dangerous and defective in that it was of a defective, improper and unsafe design and would not adequately serve its intended purpose for being mounted on a split rim and remaining in place after it was filled with air. As a result of this dangerous and defective condition which exposed the ultimate users to an unreasonable risk of harm, Plaintiffs were caused to suffer the injuries more particularly alleged herein, and said dangerous and defective condition and design was a producing cause of the injuries and damages suffered by the Plaintiffs herein.

VII.

Alternatively, the Plaintiffs would show that the Defendants failed in their duty to warn intended and potential users of the split rim and tire of their dangers and to provide them with adequate warnings concerning the lock up or latching design of the split rim, the amount of air to be inflated in the tire, when being used in conjunction with a split rim, of the dangers of mismatching the component parts of the split rim, of the proper size tires to be mounted on a split rim of the type involved in this lawsuit, and as to the dangers and potential consequences of the use of a tire and split rim of the type involved in this lawsuit. Plaintiffs would further show that said products were inherently dangerous products. As a result of this failure to warn, the Plaintiffs were caused to suffer the serious personal injuries hereinafter alleged, and said failure to warn was a producing cause of the injuries and damages suffered by the Plaintiffs.

VIII.

The Plaintiffs would alternatively show that the Defendants, and each of them, their agents, servants and employees, were negligent in many respects, both in the design

4. On or about September 23, 1975, while plaintiff, Rene Rodriguez, then age fourteen, was standing beside an inflated Goodyear truck tire mounted on a wheel designed and manufactured by Firestone, Kelsey Hayes and Budd, in Beeville, Texas, the wheel exploded violently striking plaintiff in the head and body causing severe permanent injuries.

5. The Firestone-Kelsey Hayes-Budd wheel was defective in that it had a tendency to explode and separate when put to the use which defendants could reasonably anticipate and for which the wheel was intended, namely for mounting truck tires and that at the time of the aforesaid explosion the wheel was in substantially the same condition as when manufactured, distributed and sold by defendants, so that defendants are strictly liable for injuries and damages to plaintiff resulting from the aforesaid defects and were negligent in the design, manufacture, distribution and sale of a defective product.

6. Plaintiff, Rene Rodriguez, sustained severe and permanent injuries to his head, body and limbs causing great pain, mental suffering, psychological and emotional derangement and requiring hospitalization, surgery and future medical care and treatment, and causing the loss of opportunity for employment, all to his damage in the sum of Two Million Dollars ($2,000,000.00).

7. At the time of the manufacture of the Firestone-Kelsey Hayes-Budd wheel, which was a multi-piece truck rim described as an RH5° and notoriously known as the ''suicide rim'' and ''the killer rim'', said rim was defective in that it had a proclivity to blow apart and explode when put to the use which defendants intended and anticipated and defendants with actual knowledge thereof failed to warn of said defect and failed to recall, retrofit or otherwise remedy design defects and known hazards of the rim.

8. At the time of the design, development, manufacture, distribution, licensing and sale of the subject multi-piece rim assembly and prior to decedent's injury, defendants knew that the design, configuration, materials and construction of the rim components presented an extreme and unusual hazard to the motoring public and particularly to anyone attempting to inflate the rim on a vehicle. In spite of the existence of known hazards and numerous serious and fatal injuries, of the RH5° rim and its predecessor, the RH rim, over a period of some fifty-five years, defendant negligently, willfully or intentionally,

(a) failed and refused to redesign such rims and failed to thereby preclude a mixture of parts;

(b) failed to recall such defective rims from the market;

(c) failed to develop, test and distribute safety devices to prevent explosive separation of such rims;

(d) failed to warn adequately of the hazards involved in every step of the assembly and usage of such rims;

(e) failed to develop any meaningful engineering criteria for determination of properly assembly and the extent of the hazard involved in improper assembly;

(f) failed to notify users of such rims of the risk involved in standing in close proximity of inflated assemblies;

(g) failed to replace said multi-piece assembly with safe rims of single-piece design or of safer multi-piece designs;

(h) failed to advise the United States Department of Transportation of the existence and extreme hazards presented by the defects inherent in such multi-piece rims;

(i) failed to notify and fully inform the United States Department of Transportation and state agencies

of the existence of the single-piece rim or of safer multi-piece rims as a solution to the problem;

(j) deliberately withheld information and give misinformation with respect to the nature, extent, cause and serious consequences of the defects in such rims and of the feasibility of recall or retrofit; before, during and after the attempted investigation by the Office of Defects Investigation, United States Department of Transportation, and state agencies, of multi-piece rims, and after being requested or required by the United States Department of Transportation and state agencies to develop and distribute foolproof or safe rims and to distribute adequate, clear and specific warnings with respect to such defects and hazards inherent in multi-piece rims failed to do so in a thorough, timely and specific manner;

(k) failed to discontinue production and failed to adequately test their multi-piece rims when defendants knew that better, safer products were available and knew that adequate and appropriate tests would establish defects which permit the bursting of the parts of said rims with resulting injuries or death;

(l) deliberately misrepresented to the Department of Transportation, state agencies, and to the general public the fact that the multi-piece rim was a defective and dangerous design concept remedial only by a total manufacturer's notification campaign, commonly known as recall or retrofit.

WHEREFORE, plaintiff Rene Rodriguez prays for judgment against defendants in the amount of Twenty-Two Million Dollars ($22,000,000.00) and for his costs herein expended.

COUNT II.

Comes now plaintiff, Rene Rodriguez, a minor by his Next Friend, Luciano Rodriguez, and for his claim against defendants states as follows:

1. The plaintiff is a minor, who brings this claim by his natural father and Next Friend, Luciano Rodriguez, who together with plaintiff, Delphina Rodriguez, are all citizens of the State of Texas; defendant, Firestone Tire & Rubber Company, is a Delaware corporation organized and existing under the laws of the State of Delaware with its principal office for the transaction of its ususal and customary business in Akron, Ohio, being a citizen of the States of Delaware and Ohio and not a citizen of the State of Texas; defendant Kelsey Hayes Company, is a corporation organized and existing under the laws of the State of Michigan and its principal office for the transaction of its usual and customary business in Romulus, Michigan, being a citizen of the State of Michigan and not a citizen of the State of Texas; defendant, The Goodyear Tire & Rubber Company, is a corporation organized and existing pursuant to the laws of the State of Ohio with its principal offices for the transaction of its usual business in Akron, Ohio, being a citizen of the State of Ohio and not a citizen of the State of Texas; defendant, The Budd Company, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal offices for the transaction of its usual and customary business in Detroit, Michigan, being a citizen of the States of Michigan and Pennsylvania and not a citizen of the State of Texas; so that there is complete diversity of citzenship between the parties plaintiff and parties defendant and the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, to-wit: Twenty-Two Million Dollars ($22,000,000.00) and this Court has original jurisdiction pursuant to Title 28, U.S.C.A. Section 1332(a).

2. Defendants are and at all times hereinafter alleged were in the business of designing, manufacturing, licensing, distributing and selling, among other products, steel truck

wheels and doing business in Houston, Texas, within the judicial district through the sales and marketing activities of their employees so that defendants are foreign corporations residing in the Southern District of Texas for the purpose of jurisdiction and venue, by regularly transacting business through the presence of their employees.

3. Defendants Firestone and Goodyear are and at all times hereinafter alleged were in the business of designing, manufacturing, licensing, distributing and selling, among other products, truck tires, including wire tires and heavy ply radial tires, within the judicial district through sales and marketing activities of their employees so that defendants are foreign corporations residing in the Southern District of Texas for the purpose of jurisdiction and venue, by regularly transacting business through the presence of their employees.

4. On or about September 23, 1975, while plaintiff, Rene Rodriguez, then age fourteen, was standing beside an inflated Goodyear truck tire mounted on a wheel designed and manufactured by Firestone, Kelsey Hayes and Budd, in Beeville, Texas, the wheel exploded violently striking plaintiff in the head and body causing severe permanent injuries.

5. Plaintiff, Rene Rodriguez, sustained severe and permanent injuries to his head, body and limbs causing great pain, mental suffering, psychological and emotional derangement and requiring hospitalization, surgery and future medical care and treatment, and causing the loss of opportunity for employment, all to his damage in the sum of Two Million Dollars ($2,000,000.00).

6. Defendants and certain executive officers and employees conspiring with each other and with other manufacturers defrauded plaintiff, the United States of America,

the several States, state and federal courts, litigants, and the general public for the purposes of avoiding a manufacturer's notification campaign, commonly known as recall or retrofit and avoiding liability to litigants and claimants killed, blinded, maimed and otherwise injured by the RH5° rim, its predecessors and successors over a period exceeding 50 years, including specific acts and conduct similar thereto hereafter more fully set forth

7. POLITICAL SLUSH FUND. Defendants established and utilized a political slush fund into which it diverted corporate assets in excess of One Million Dollars ($1,000,000.00), which was used for illegal purposes including the avoidance of a government mandated recall campaign of certain multi-piece rims, including the RH5° rim. Approximately Three Hundred Thirty-Three Thousand Dollars ($333,000.00) in illegal domestic political payments were made between November 1970 and May 1973, the distribution of which was directed by corporate executives.

8. FALSE REPRESENTATIONS AS TO THE NUMBER AND SEVERITY OF RIM EXPLOSIONS. Defendants deliberately and fraudulently understated and minimized the number of known incidents, claims and lawsuits involving multi-piece rims including the RH and RH5° rims in testimony and official responses to inquiries by the United States Department of Transportation, the Industrial Commission of the State of Utah, and in various lawsuits in state and federal district courts.

9. ON-VEHICLE INFLATION HAZARD. Defendants deliberately and fraudulently withheld information from the U.S. Department of Transportation, the Industrial Commission of the State of Utah, federal district courts and state trial courts, that the RH and RH5° rims were the only medium or heavy duty truck rims which explode outboard when mounted on rear wheels or trucks and school buses thereby

causing a serious hazard to any person attempting to check air pressure or add air to a partially inflated tire, or to lower a vehicle from a jack to the ground, or vice versa, as well as constituting a deadly hazard to passengers and bystanders or other persons within range of the exploding ring.

10. STEERING AXLE HAZARD. Defendants deliberately and fraudulently withheld evidence that the RH and RH5° rims were the only type in the country which are designed so they explode inboard on the steering axles of school buses and trucks, severing brake lines and disabling steering mechanisms thereby causing head-on collisions, roll over and other fatal and crippling vehicular collisions, and defendants suppressed evidence that those exposed to hazards peculiar to the RH5° rim are not limited to tire busters but include children on school buses, as well as the entire motoring public.

11. XL AS THE FAIL-SAFE SOLUTION. Defendants deliberately and fraudulently misrepresented the XL two-piece rim as a "fail-safe" successor to the RH5° rim when defendants knew that the XL rim was unsafe in that it has the same capability of explosion with resultant death or injury whether on or off vehicles.

12. WARNING STICKERS. Defendants deliberately and fraudulently conspired with others to remain silent and avoid adequate warning to users of multi-piece truck rim components, including the RH5° type by failing to attach warning stickers to rims, by representing that it was impossible to devise a sticker which would be prominent and would adhere to new and existing rims, by abandoning defendants' warning sticker project for multi-piece rims and encouraging other rim manufacturers to abandon existing and proposed warning sticker programs, all for the purposes of avoiding expense and avoiding the admission of liability

for products liability rim explosion cases at the expense of human life and health including that of the plaintiff.

13. SAFETY CAGE AS THE SOLUTION. Defendants deliberately and fraudulently misrepresented that safety cages and other restraining devices would effectively eliminate death and injury from multi-piece rim explosions in general and RH5° rim explosions in particular although defendants knew that numerous explosions resulting in blinding, maiming, crippling and death were and are occurring during vehicular mounting and demounting, while vehicles are in service and during routine tire maintenance, inflation and deflation of rim assemblies mounted on vehicles, and defendants deliberately and fraudulently failed to advise and acknowledge that safety cages and restraining devices are useless at such times and would not avoid numerous rim explosion occurrences involving death and serious injury.

13. WARNING AND MATCHING LITERATURE AS THE SOLUTION. Defendants deliberately and fraudulently misrepresented that printed warning materials and rim component matching literature were an alternative solution to the multi-piece rim explosion hazard although they knew that such printed literature and materials rarely reached the ultimate users and tire busters, and that explosion injuries and death would continue regardless of such literature and materials because the literature would not be appropriately disseminated, was difficult or impossible for most users to comprehend, and even if disseminated and comprehended that compliance was impossible or impractical.

14. WEAR FROM SQUEAKING AND RUN FLAT. Defendants deliberately and fraudulently failed to disclose complaints from users, original equipment manufacturers and distributors that new and serviceable used RH5° rims manufactured during the 1950s and 1960s experienced a phenomenon of ''squeaking'' indicative of relative motion

and that RH5° rims whenever manufactured and under inflated or run flat experienced relative motion, both of which conditions cause rapid wear between components properly mounted resulting in loss of locking fit.

15. DISTRIBUTION OF WARNING LITERATURE AND THE CONSPIRACY OF SILENCE. Defendants deliberately and fraudulently withheld information, instructional and warning material and failed to fulfill its promise to the Department of Transportation and its obligation to the public to distribute warning literature and rim matching information.

16. MISMATCH HAZARD. Defendants deliberately and fraudulently misrepresented that the RH5° rim could not be mismatched with other sizes and types made by defendants and other manufacturers, that there were only two manufacturers of the RH5° rim component, that only defendants manufactured the RH5° ring component and that the manufacturers shared drawings, blueprints and specifications so that parts were identical and interchangeable, although defendants knew that such representations were false because there were other undisclosed manufacturers of such components which if mated with defendants' components created a hazardous mismatch condition while appearing to match, because defendants and other manufacturers made substantial design changes in RH5° rim components without notice to each other or to the public thereby enhancing the probability of explosion because of hazardous mismatch between components which predated and antedated changes and between components of different manufacturers.

17. TIRE INCOMPATIBILITY. Defendants deliberately and fraudulently failed to disclose that certain multipiece rims including that RH5° are incompatible with radial tires, steel bias-ply tires, or tires of high load range and

failed to disclose that the risk of explosion is substantially increased when such tires are mounted and inflated on certain multi-piece rims including RH5° rims and failed to disclose that said rims manufactured during the 1950s and 1960s are stamped with misinformation concerning tire sizes and load ranges subsequently in effect.

18. SINGLE-PIECE RIM AS THE SAFE SOLUTION. Defendants deliberately and fraudulently failed to disclose the development during the 1950s of a completely safe singlepiece drop center rim for usage on all trucks which if promoted would entirely eliminate the rim explosion hazard and conspired with others to keep silent with respect to the development of the state of the art in order to maintain their position in the truck tire market, which activity was motivated solely by profit and at the expense of life and health of the public, including the plaintiffs.

19. The plaintiffs, the United States Department of Transportation, authorities in the several States and the general public reasonably relied on defendants to make full and honest disclosures with respect to the design, production, distribution, warning and instruction of truck rims and as a result of the foregoing fraudulent misrepresentations plaintiff sustained severe permanent and progressive personal injury, pain, anguish and suffering, medical expense and loss of earnings all to his actual damage in the sum of One Million Dollars ($1,000,000.00).

20. As a result of the foregoing fraudulent misrepresentations of defendants, plaintiff is entitled to exemplary damages in the sum of Twenty Million Dollars ($20,-000,000.00).

21. Most of the acts, omissions and misrepresentations of the defendants occurred or were planned at defendants' places of business in Ohio. Plaintiffs request that the Court

Complaint.

In the United States District Court for the Western District of Missouri, Western Division.

Larry Hale and Linda Hale, Plaintiffs, v. Firestone Tire & Rubber Company, A Corporation, Defendant. Case No. 78-0266-CV-W.

Filed Aug. 29 1978.

COMPLAINT

COUNT I.

Comes now plaintiff, Larry Hale, and for his claim against defendant, states as follows:

1. Plaintiffs are individual citizens of Sheldon, Missouri; defendant is a corporation organized and existing under the laws of the State of Ohio, with its principal office for the transaction of its usual and customary business in Akron, Ohio, so that defendant is a citizen of the State of Ohio and not a citizen of the State of Missouri, and there is complete diversity of citizenship between the parties, plaintiff and defendant.

2. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, to-wit: Five Million Five Hundred Thousand Dollars ($5,500,000.00), and this Court has jurisdiction in the first instance pursuant to Title 28, U.S.C. Sec. 1332(a).

3. Defendant is and at all times hereafter alleged was in the business of designing, manufacturing, licensing, distributing and selling, among other products, steel truck rims and in particular a certain notorious rim assembly, designated by defendant as the RH5° rim; defendant is subject to the jurisdiction of this Court because it has a district office for the transaction of business at 2001 Grand Avenue,

Kansas City, Missouri, within the Western District of Missouri.

4. On or about October 4, 1977, while the plaintiff, Larry J. Hale, was standing beside an inflated truck tire mounted on an RH5° Firestone rim mounted on a 1968 Ford F750 flat bed truck located near Sarcoxie, Missouri, the ring of the RH5° rim assembly separated from the rim and disc wheel to which it was intended to be affixed causing a violent explosion and striking the plaintiff in the head and body resulting in the serious permanent and progressive injuries to plaintiff as more fully hereinafter set forth.

5. The Firestone RH5° rim assembly was defective at the time of manufacture in that it had a tendency to burst apart and fail when put to the use which defendant could reasonably anticipate and for which the assembly was intended.

6. On October 4, 1977, the Firestone RH5° rim assembly was in substantially the same condition as when manufactured by defendant and on said date was being used as reasonably anticipated and intended by defendant, that is to support an inflated truck tire on the outer dual of the rear axle.

7. As the direct and proximate result of the aforesaid explosion of the Firestone RH5° rim assembly, plaintiff Larry J. Hale, was struck with great force and violence about the face, head, body, arms, hands, and legs, resulting in head injuries, diplopia, diminished vision, broken and lost teeth, severe facial lacerations, a broken hand, multiple contusions, abrasions and lacerations, and multiple injuries to all the nerves, tissues, bones and joints of his body, causing excruciating physical pain and mental anguish, all of which injuries are permanent and progressive. As a result of the aforesaid injuries, plaintiff has been disabled from

performing gainful employment and will continue to suffer from said disabilities, and has lost and will continue to lose income. Plaintiff's injuries have and will in the future hamper and restrict plaintiff's physical activities and participation in physical or mental endeavors. Plaintiff has been compelled to undergo medical and surgical procedures, been confined to hospitals for extended periods of time, and will in the future require additional medical attention at great expense, inconvenience and resulting in considerable pain and anguish for the remainder of his life. Because of the foregoing injuries, plaintiff has been damaged in the sum of Five Hundred Thousand Dollars ($500,000.00).

8. At the time of the design, development, manufacture, distribution, licensing and sale of the subject RH5° rim assembly and prior to plaintiff's injury, defendant knew that the design, configuration, materials and construction of the multi-piece Firestone rims presented an extreme and unusual hazard to the motoring public and particularly to anyone attempting to add air pressure to an inflated assembly utilizing the notorious RH5° rim. In spite of the existence of known hazards and numerous serious and fatal injuries, over a period of some fifty-five years defendant Firestone Tire & Rubber Company, negligently, willfully or intentional

(a) failed and refused to redesign multi-piece rims in general and the RH and RH5° rims in particular;

(b) failed to recall such defective rims from the market;

(c) failed to develop, test and distribute safety devices to prevent explosive separation of multi-piece rims;

(d) failed to warn adequately of the hazards involved in every step of the assembly and usage of such rims;

(e) failed to develop any meaningful engineering criteria for determination of proper assembly and the extent of the hazard involved in improper assembly;

(f) failed to notify users of such rims of the risk involved in standing in close proximity to inflated assemblies;

(g) failed to replace the multi-piece assembly with safe rims of single-piece design or of safer multi-piece designs;

(h) failed to advise the United States Department of Transportation of the existence and extreme hazard presented by the defects inherent in the notorious RH5° rim and its predecessor;

(i) failed to notify and fully inform the United States Department of Transportation and state agencies of the existence of the single-piece rim or of safer multi-piece rims as a solution to the problem;

(j) deliberately withheld information and gave misinformation with respect to the nature, extent, cause and serious consequences of the defects in such rims and of the feasibility of recall or retrofit, before, during and after the attempted investigation by the Office of Defects Investigation, United States Department of Transportation, and state agencies, in re the RH5° Firestone multi-piece rim and after being requested or required by the United States Department of Transportation and state agencies to develop and distribute foolproof or safe rims and to distribute adequate, clear and specific warnings with respect to such defects and hazards inherent in the notorious RH5° rim failed to do so in a thorough, timely and specific manner;

(k) failed to discontinue production and failed to adequately test its RH5° rims and related rims when defendant knew that better, safer products were available and knew that adequate and appropriate tests would establish defects which permit the bursting of

the parts of the said rims with resulting injuries or death;

(l) deliberately misrepresented to the Department of Transportation, state agencies, and to the general public the fact that the RH5° rim was a defective and dangerous design concept remedial only by a total manufacturer's notification campaign, commonly known as recall or retrofit.

Plaintiff states that the conduct and failures of defendant, Firestone Tire & Rubber Company, and its individual officers and employees acting as the agents of Firestone, were in willful, wanton, reckless and grossly negligent disregard for the safety of the public and particularly the plaintiff in that defendant's conduct was motivated solely by profit and convenience without regard to safety or preservation of human life and was oppressive, and as a result of the aforesaid plaintiff is entitled to exemplary damages in the sum of Five Million Dollars ($5,000,000.00).

9. Most of the acts, omissions and misrepresentations of the defendant occurred or were planned at defendant's principal place of business in Akron, Ohio. Plaintiffs request that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiff prays judgment against defendant in Count I in the sum of Five Hundred Thousand Dollars ($500,000.00) actual damages and Five Million Dollars ($5,000,000.00) punitive damages and his costs herein expended.

COUNT II.

Comes now Larry Hale and for his claim against defendant in Count II states as follows:

1. Plaintiff incorporates by specific reference as if fully hereinafter set forth each allegation of paragraphs 1, 2, 3 and 4 of Count I hereof.

2. Defendant Firestone Tire & Rubber Company, hereinafter referred to as Firestone, and certain executive officers and employees conspiring with each other and with other manufacturers defrauded plaintiff, the United States of America, the several States, state and federal courts, litigants, and the general public for the purposes of avoiding a manufacturer's notification campaign, commonly known as recall or retrofit and avoiding liability to litigants and claimants killed, blinded, maimed and otherwise injured by the RH5° rim, its predecessors and successors over a period exceeding 50 years, including specific acts and conduct similar thereto hereafter more fully set forth.

3. POLITICAL SLUSH FUND. Firestone established and utilized a political slush fund into which it diverted corporate assets in excess of One Million Dollars ($1,000,000.00), which was used for illegal purposes including the avoidance of a government mandated recall campaign of the RH5° rim. Approximately Three Hundred Thirty-Three Thousand Dollars ($333,000.00) in illegal domestic political payments were made between November, 1970 and May, 1973, the distribution of which was directed by Firestone executives.

4. FALSE REPRESENTATIONS AS TO THE NUMBER AND SEVERITY OF RIM EXPLOSIONS. Firestone deliberately and fraudulently understated and minimized the number of known incidents, claims and lawsuits involving RH and RH5° rims in testimony and official responses to

inquiries by the United States Department of Transportation, the Industrial Commission of the State of Utah, and in various lawsuits in state and federal district courts.

5. ON VEHICLE INFLATION HAZARD. Firestone deliberately and fraudulently withheld information from the U.S. Department of Transportation, the Industrial Commission of the State of Utah, federal district courts and state trial courts, that the RH and RH5° rims were the only medium or heavy truck rims which explode outboard when mounted on rear wheels of trucks and school buses thereby causing a serious hazard to any person attempting to check air pressure or add air to a partially inflated tire, or to lower a vehicle from a jack to the ground, or vice versa, as well as constituting a deadly hazard to passengers and bystanders or other persons within range of the exploding ring.

6. STEERING AXLE HAZARD. Firestone deliberately and fraudulently withheld evidence that the RH and the RH5° rims were the only type in the country which are designed so they explode inboard on the steering axles of school buses and trucks, severing brake lines and disabling steering mechanisms thereby causing head-on collisions, roll over, and other fatal and crippling vehicular collisions, and Firestone suppressed evidence that those exposed to hazards peculiar to the RH5° rim are not limited to tire busters but include children on school buses, as well as the entire motoring public.

7. XL AS THE FAIL-SAFE SOLUTION. Firestone deliberately and fraudulently misrepresented its XL two-piece rim as a ''fail-safe'' successor to the RH5° rim when Firestone knew that the XL rim was unsafe in that it has the same capability of explosion with resultant death or injury whether on or off vehicles.

8. WARNING STICKERS. Firestone deliberately and fraudulently conspired with others to remain silent and avoid

adequate warning to users of multi-piece truck rim components, including the RH5° type by failing to attach warning stickers to rims, by representing that it was impossible to devise a sticker which would be prominent and would adhere to new and existing rims, by abandoning Firestone's warning sticker project for multi-piece rims and encouraging other rim manufacturers to abandon existing and proposed warning sticker programs, all for the purposes of avoiding approximately $600,000.00 in expense and avoiding the admission of liability for products liability rim explosion cases at the expense of human life and health including that of the plaintiff.

9. SAFETY CAGE AS THE SOLUTION. Firestone deliberately and fraudulently misrepresented that safety cages and other restraining devices would effectively eliminate death and injury from multi-piece rim explosions in general and RH5° rim explosions in particular although Firestone knew that numerous explosions resulting in blinding, maiming, crippling and death were and are occurring during vehicular mounting and demounting, while vehicles are in service and during routine tire maintenance, inflation and deflation of rim assemblies mounted on vehicles, and Firestone deliberately and fraudulently failed to advise and acknowledge that safety cages and restraining devices are useless at such times and would not avoid numerous rim explosion occurrences involving death and serious injury.

10. WARNING AND MATCHING LITERATURE AS THE SOLUTION. Firestone deliberately and fraudulently misrepresented that printed warning materials and rim component matching literature were an alternative solution to the multi-piece rim explosion hazard although Firestone knew that such printed literature and materials rarely reached the ultimate users and tire busters, and that explosion injuries and death would continue regardless of such literature and

materials because the literature would not be appropriately disseminated, was difficult or impossible for most users to comprehend, and even if disseminated and comprehended that compliance was impossible or impractical.

11. WEAR FROM SQUEAKING AND RUN FLAT. Firestone deliberately and fraudulently failed to disclose complaints from users, original equipment manufacturers and distributors that new and serviceable used RH5° rims manufactured during the 1950s and 1960s experienced a phenomenon of ''squeaking'' indicative of relative motion and that RH5° rims whenever manufactured and under inflated or run flat experienced relative motion, both of which conditions cause rapid wear between components properly mounted resulting in loss of locking fit.

12. DISTRIBUTION OF WARNING LITERATURE AND THE CONSPIRACY OF SILENCE. Firestone deliberately and fraudulently withheld information, instructional and warning material and failed to fulfill its promise to the Department of Transportation and its obligation to the public to distribute warning literature and rim matching information.

13. MISMATCH HAZARD. Firestone deliberately and fraudulently misrepresented that the RH5° rim could not be mismatched with other sizes and types made by Firestone and other manufacturers, that there were only two manufacturers of the RH5° rim component, that only Firestone manufactured the RH5° ring component and that the manufacturers shared drawings, blueprints and specifications so that parts were identical and interchangeable, although Firestone knew that such representations were false because there were other undisclosed manufacturers of such components which if mated with Firestone components created a hazardous mismatch condition while appearing to match, because Firestone and other manufacturers made substantial

design changes in RH5° rim components without notice to each other or to the public thereby enhancing the probability of explosion because of hazardous mismatch between components which predated and antedated changes and between components of different manufacturers.

14. TIRE INCOMPATIBILITY. Firestone deliberately and fraudulently failed to disclose that RH5° rims are incompatible with radial tires, steel bias-ply tires, or tires of high load range and failed to disclose that the risk of explosion is substantially increased when such tires are mounted and inflated on RH5° rims and failed to disclose that RH5° rims manufactured during the 1950s and 1960s are stamped with misinformation concerning tire sizes and load ranges subsequently in effect.

15. SINGLE-PIECE RIM AS THE SAFE SOLUTION. Firestone deliberately and fraudulently failed to disclose that it had developed during the 1950s a completely safe single-piece drop center rim for usage on all trucks which if promoted would entirely eliminate the rim explosion hazard and conspired with others to keep silent with respect to the development of the state of the art in order to maintain its position in the truck tire market, which activity was motivated solely by profit and at the expense of life and health of the public, including the plaintiff.

16. The plaintiff, the United States Department of Transportation, authorities in the several States and the general public reasonably relied on Firestone to make full and honest disclosure with respect to the design, production, distribution, warning and instruction of its truck rims and as a result of the foregoing fraudulent misrepresentations plaintiff sustained severe permanent and progressive personal injury, pain, anguish and suffering, medical expense and loss of earnings all to his actual damage in the sum of Five Hundred Thousand Dollars ($500,000.00).

defendant knew that better, safer products were available and knew that adequate and appropriate tests would establish defects which permit the bursting of the parts of the said rims with resulting injuries or death;

(l) deliberately misrepresented to the Department of Transportation, state agencies, and to the general public the fact that the RH5° rim was a defective and dangerous design concept remedial only by a total manufacturer's notification campaign, commonly known as recall or retrofit.

Plaintiff states that the conduct and failures of defendant, Firestone Tire & Rubber Company, and its individual officers and employees acting as the agents of Firestone, were in willful, wanton, reckless and grossly negligent disregard for the safety of the public and particularly the plaintiff in that defendant's conduct was motivated solely by profit and convenience without regard to safety or preservation of human life and was oppressive, and as a result of the aforesaid plaintiff is entitled to exemplary damages in the sum of One Million Dollars ($1,000,000.00).

9. Most of the acts, omissions and misrepresentations of the defendant occurred or were planned at defendant's principal place of business in Akron, Ohio. Plaintiffs request that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiff prays judgment against defendant in Count III in the sum of One Hundred Thousand

Dollars ($100,000.00) actual damages and One Million Dollars ($1,000,000.00) punitive damages and for her costs herein expended.

COUNT IV.

Comes now Linda Hale and for her claim against defendant states as follows:

1. Plaintiff incorporates by specific reference as if fully hereinafter set forth each allegation of paragraphs 1, 2, 3 and 4 of Count III hereof.

2. Defendant Firestone Tire & Rubber Company, hereinafter referred to as Firestone, and certain executive officers and employees conspiring with each other and with other manufacturers defrauded plaintiff, the United States of America, the several States, state and federal courts, litigants, and the general public for the purposes of avoiding a manufacturers' notification campaign, commonly known as recall or retrofit, and avoiding liability to litigants and claimants killed, blinded, maimed and otherwise injured by the RH5° rim, its predecessors and successors over a period exceeding fifty years, including specific acts and conduct similar thereto hereafter more fully set forth.

3. POLITICAL SLUSH FUND. Firestone established and utilized a political slush fund into which it diverted corporate assets in excess of One Million Dollars ($1,000,000.00), which was used for illegal purposes including the avoidance of a government mandated recall campaign of the RH5° rim. Apparently Three Hundred Thirty-Three Thousand Dollars ($333,000,00) in illegal domestic political payments were made between November, 1970 and May, 1973, the distribution of which was directed by Firestone executives.

4. FALSE REPRESENTATIONS AS TO THE NUMBER AND SEVERITY OF RIM EXPLOSIONS. Firestone

deliberately and fraudulently understated and minimized the number of known incidents, claims and lawsuits involving RH and RH5° rims in testimony and official responses to inquiries by the United States Department of Transportation, the Industrial Commission of the State of Utah, and in various lawsuits in state and federal district courts.

5. ON VEHICLE INFLATION HAZARD. Firestone deliberately and fraudulently withheld information from the U.S. Department of Transportation, the Industrial Commission of the State of Utah, federal district courts and state trial courts, that the RH and RH5° rims were the only medium or heavy truck rims which explode outboard when mounted on rear wheels of trucks and school buses thereby causing a serious hazard to any person attempting to check air pressure or add air to a partially inflated tire, or to lower a vehicle from a jack to the ground, or vice versa, as well as constituting a deadly hazard to passengers and bystanders or other persons within range of the exploding ring.

6. STEERING AXLE HAZARD. Firestone deliberately and fraudulently withheld evidence that the RH and the RH5° rims were the only type in the country which are designed so they explode inboard on the steering axles of school buses and trucks, severing brake lines and disabling steering mechanisms thereby causing head-on collisions, roll over, and other fatal and crippling vehicular collisions thereby suppressing evidence that the exposure to hazards peculiar to the RH5° rim is not limited to tire busters but includes children on school buses, as well as the entire motoring public.

7. XL AS THE FAIL-SAFE SOLUTION. Firestone deliberately and fraudulently misrepresented its XL two-piece rim as a "fail-safe" successor to the RH5° rim when Firestone knew that the XL rim was unsafe in that it has

the same capability of explosion with resultant death or injury whether on or off vehicles.

8. WARNING STICKERS. Firestone deliberately and fraudulently conspired with others to remain silent and avoid adequate warning to users of multi-piece truck rim components, including the RH5° type by failing to attach warning stickers to rims, by representing that it was impossible to devise a sticker which would be prominent and would adhere to new and existing rims, by abandoning Firestone's warning sticker project for multi-piece rims and encouraging other rim manufacturers to abandon existing and proposed warning sticker programs, all for the purposes of avoiding approximately $600,000.00 in expense and avoiding the admission of liability rim explosion cases at the expense of human life and health including that of the plaintiff's husband, Larry J. Hale.

9. SAFETY CAGE AS THE SOLUTION. Firestone deliberately and fraudulently misrepresented that safety cages and other restraining devices would effectively eliminate death and injury from multi-piece rim explosions in general and RH5° rim explosions in particular although Firestone knew that numerous explosions resulting in blinding, maiming, crippling and death were and are occurring during vehicular mounting and demounting, while vehicles are in service and during routine tire maintenance, inflation and deflation of rim assemblies mounted on vehicles, and Firestone deliberately and fraudulently failed to advise and acknowledge that safety cages and restraining devices are useless at such times and would not avoid numerous rim explosion occurrences involving death and serious injury.

10. WARNING AND MATCHING LITERATURE AS THE SOLUTION. Firestone deliberately and fraudulently misrepresented that printed warning materials and rim component matching literature were an alternative solution to

the multi-piece rim explosion hazard although Firestone knew that such printed literature and materials rarely reached the ultimate users and tire busters, and that explosion injuries and death would continue regardless of such literature and materials because the literature would not be appropriately disseminated, was difficult or impossible for most users to comprehend, and even if disseminated and comprehended that compliance was impossible or impractical.

11. WEAR FROM SQUEAKING AND RUN FLAT. Firestone deliberately and fraudulently failed to disclose complaints from users, original equipment manufacturers and distributors that new and serviceable used RH5° rims manufactured during the 1950s and 1960s experienced a phenomenon of ''squeaking'' indicative of relative motion and that RH5° rims whenever manufactured and under inflated or run flat experienced relative motion, both of which conditions cause rapid wear between components properly mounted resulting in loss of locking fit.

12. DISTRIBUTION OF WARNING LITERATURE AND THE CONSPIRACY OF SILENCE. Firestone deliberately and fraudulently withheld information, instructional and warning material and failed to fulfill its promise to the Department of Transportation and its obligation to the public to distribute warning literature and rim matching information.

13. MISMATCH HAZARD. Firestone deliberately and fraudulently misrepresented that the RH5° rim could not be mismatched with other sizes and types made by Firestone and other manufacturers, that there were only two manufacturers of the RH5° rim component, that only Firestone manufactured the RH5° ring component and that the manufacturers shared drawings, blueprints and specifications so that parts were identical and interchangeable, although Firestone knew that such representations were false because

there were other undisclosed manufacturers of such components which if mated with Firestone components created a hazardous mismatch condition while appearing to match, because Firestone and other manufacturers made substantial design changes in RH5° rim components without notice to each other or to the public thereby enhancing the probability of explosion because of hazardous mismatch between components which predated and antedated changes and between components of different manufacturers.

14. TIRE INCOMPATIBILITY. Firestone deliberately and fraudulently failed to disclose that RH5° rims are incompatible with radial tires, steel bias-ply tires, or tires of high load range and failed to disclose that the risk of explosion is substantially increased when such tires are mounted and inflated on RH5° rims and failed to disclose that RH5° rims manufactured during the 1950s and 1960s are stamped with misinformation concerning tire sizes and load ranges subsequently in effect.

15. SINGLE-PIECE RIM AS THE SAFE SOLUTION. Firestone deliberately and fraudulently failed to disclose that it had developed during the 1950s a completely safe single-piece drop center rim for usage on all trucks which if promoted would entirely eliminate the rim explosion hazard and conspired with others to keep silent with respect to the development of the state of the art in order to maintain its position in the truck tire market, which activity was motivated solely by profit and at the expense of life and health of the public, including the plaintiff's husband, Larry J. Hale.

16. The plaintiff, the United States Department of Transportation, authorities in the several States and the general public reasonably relied on Firestone to make full and honest disclosure with respect to the design, production, distribution, warning and instruction of its truck rims, and

as a result of the foregoing fraudulent misrepresentations plaintiff's husband, Larry J. Hale, sustained severe permanent and progressive personal injury, pain, anguish and suffering, medical expense and loss of earnings. As a result of the aforesaid injuries, plaintiff, Linda Hale, as the spouse of Larry J. Hale, has sustained the loss of services and companionship and support of her husband and their marital relationship has been interrupted and disturbed, all to her damage in the sum of One Hundred Thousand Dollars ($100,000.00).

17. As a result of the foregoing fraudulent misrepresentations of Firestone, plaintiff is entitled to exemplary damages in the sum of One Million Dollars ($1,000,000.00).

18. Most of the acts, omissions and misrepresentations of the defendant occurred or were planned at defendant's principal place of business in Akron, Ohio. Plaintiffs request that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiff prays judgment against defendant in Count IV in the sum of One Hundred Thousand Dollars ($100,000.00) actual damages and One Million Dollars ($1,000,000.00) punitive damages and her costs herein expended.

NIEWALD, RISJORD & WALDECK,
By /s/ JOHN C. RISJORD,
JOHN C. RISJORD
Attorneys for Plaintiffs.

DEMAND FOR TRIAL BY JURY

Plaintiffs demand trial
by jury.

Complaint.

In the United States District Court for the Western District of Missouri, Western Division.

Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin and Kathy Diane Goodwin, Minors, by and through their Natural Mother and Next Friend, Edna Goodwin Perkins, and Edna Goodwin Perkins, Individually, Plaintiffs, vs. Firestone Tire And Rubber Company, and The Goodyear Tire & Rubber Company, Defendants. Case No. 78-0408-CV-W-1.

Filed: June 5, 1978.

COMPLAINT
COUNT I

COME NOW plaintiffs and for Count I of their Complaint, state as follows:

1. Plaintiffs are individual citizens of the State of Mississippi, residing in Calhoun County; defendants are corporations organized and existing pursuant to the laws of the State of Ohio with their principal offices for the transaction of their usual business in Akron, Summit County, Ohio, so that defendants are citizens of the State of Ohio and not citizens of Mississippi so there is complete diversity of citizenship between the parties.

2. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, to wit: Eleven Million Dollars ($11,000,000.00), and this Court has jurisdiction in the first instance pursuant to Section 1332(a), U.S.C.

3. At all times hereinafter alleged, defendants were duly authorized to transact business in the State of Missouri and have offices and distribution centers for their products in

Kansas City, Jackson County, Missouri, within the Western Division of the Western District of Missouri.

4. Plaintiff Edna Goodwin Perkins is the surviving spouse of Willie Earl Goodwin, deceased; Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin and Kathy Diane Goodwin are unmarried minors and the natural children of Willie Earl Goodwin, deceased. Plaintiffs were all dependent upon Willie Earl Goodwin, deceased, for support and maintenance at the time of his death, on or about June 13, 1975.

5. On or about May 22, 1973, a multi-piece truck rim manufactured by defendants, and assembled and inflated by a person other than the decedent exploded at Bruce, Calhoun County, Mississippi, while plaintiffs' decedent was mounting it on a vehicle causing massive injuries to plaintiffs' decedent, Willie Earl Goodwin, age 31, which caused his death at Memphis, Tennessee on June 13, 1975.

6. At the time of the manufacture of the multi-piece truck rim by defendants, said rim was defective in that it had a proclivity to blow apart and explode when put to the use which defendants intended and anticipated, and defendants failed to warn of said defect and failed to recall, retrofit or otherwise remedy design defects and known hazards of its multi-piece rims.

7. At the time of the explosion which killed plaintiffs' decedent, the truck rim assembly was in substantially the same condition as when manufactured by defendants, and was being used by plaintiffs' decedent as the product was reasonably intended to be used and as defendants anticipated its use and because of the aforesaid defect in said assembly, it broke apart and exploded, fatally injuring plaintiffs' decedent, Willie Earl Goodwin.

ing it on a vehicle causing massive injuries to plaintiffs' decedent, Willie Earl Goodwin, age 31, which caused his death at Memphis, Tennessee on June 13, 1975.

6. Plaintiffs' deceased received fatal injuries to his chest, abdomen, legs, arms and shoulders, and other parts of his body which caused great pain, mental suffering, psychological and emotional derangement and suffering.

7. Defendants Firestone Tire & Rubber Company and The Goodyear Tire & Rubber Company, hereinafter referred to as Firestone and Goodyear, and certain executive officers and employees conspiring with each other and with other manufacturers defrauded plaintiffs, the United States of America, the several States, state and federal courts, litigants, and the general public for the purposes of avoiding a manufacturers' notification campaign, commonly known as recall or retrofit, and avoiding liability to litigants and claimants killed, blinded, maimed and otherwise injured by multi-piece rims, over a period exceeding fifty years, including specific acts and conduct similar thereto hereafter more fully set forth.

8. POLITICAL SLUSH FUND. Firestone and Goodyear established and utilized political slush funds into which they diverted corporate assets in excess of One Million Dollars ($1,000,000.00), which were used for illegal purposes including the avoidance of a government investigation, discontinuance of production and a recall campaign of certain multi-piece rims. During the government investigation from 1969 through 1973, Firestone and Goodyear made illegal, domestic political payments, the distribution of which was directed by company executives, which payments were utilized to influence the aforesaid government investigation and proposed action.

9. FALSE REPRESENTATIONS AS TO THE NUMBER AND SEVERITY OF RIM EXPLOSIONS. Firestone and Goodyear deliberately and fraudulently understated and minimized the number of known incidents, claims and lawsuits involving multi-piece rims in testimony and official responses to inquiries by the United States Department of Transportation, investigatory departments of various states and in various lawsuits in state and federal district courts.

10. VEHICLE MOUNTING AND DEMOUNTING HAZARD. Firestone and Goodyear deliberately and fraudulently withheld information from the United States Department of Transportation, the investigatory departments of various states and the federal district courts and state trial courts that multi-piece truck rims of the type which killed plaintiffs' decedent have a proclivity for explosion during mounting and demounting on vehicles thereby causing potentially lethal explosions and injury or death to any person attempting to mount or demount an inflated multi-piece rim assembly onto or from a vehicle.

11. WARNING STICKERS. Firestone and Goodyear deliberately and fraudulently conspired between themselves and with others at secret and clandestine meetings at the Mayflower Hotel in Washington, D.C. and elsewhere to remain silent and avoid adequate warning to users of multi-piece truck rim components by failing to attach warning stickers to rims, by representing that it was impossible to devise a sticker which would be prominent and would adhere to new and existing rims, by abandoning their warning sticker projects for multi-piece rims and encouraging, agreeing and conspiring with each other and other rim manufacturers to abandon existing and proposed warning sticker programs, all for the purposes of avoiding approximately $1,000,000.00 in expense and avoiding the admission of liability for products liability rim explosion cases at the

expense of human life and health including that of the plaintiffs' decedent.

12. SAFETY CAGE AS THE SOLUTION. Firestone and Goodyear deliberately and fraudulently misrepresented that safety cages and other restraining devices would effectively eliminate death and injury from multi-piece rim explosions although they knew that numerous explosions resulting in blinding, maiming, crippling and death were and are occurring during vehicular mounting and demounting, while vehicles are in service and during routine tire maintenance, inflation and deflation of rim assemblies mounted on vehicles, and Firestone and Goodyear deliberately and fraudulently failed to advise and acknowledge that safety cages and restraining devices are useless at such times and would not avoid numerous rim explosion occurrences involving death and serious injury.

13. WARNING AND MATCHING LITERATURE AS THE SOLUTION. Firestone and Goodyear deliberately and fraudulently misrepresented that printed warning materials and rim component matching literature were an alternative solution to the multi-piece rim explosion hazard although Firestone and Goodyear knew that such printed literature and materials rarely reached the ultimate users and tire busters, and that explosion injuries and death would continue regardless of such literature and materials because defendants never intended to distribute the literature promulgated by the federal government, failed to distribute such literature, knew that the literature was difficult or impossible for most users to comprehend, and even if disseminated and comprehended that compliance was impossible, impractical and ineffective in preventing death and injury.

14. RUN FLAT HAZARD. Firestone and Goodyear deliberately and fraudulently failed to disclose the results of tests and complaints indicating that a majority of multi-

piece rim assemblies, including the type which killed plaintiffs' decedent, become missiles whenever the tire assembled thereon becomes deflated on the highway causing an unreasonable risk to the public, which if fully known to the National Highway Traffic Safety Administration, would have resulted in the promulgation of federal motor vehicle safety standards, recall and retrofit which would have eliminated the subject rim prior to the time it killed plaintiffs' decedent.

15. DISTRIBUTION OF WARNING LITERATURE AND CONSPIRACY OF SILENCE. Firestone and Goodyear deliberately and fraudulently withheld information, instructional and warning material and failed to fulfill their promises to the Department of Transportation and their obligations to the public to distribute warning literature and rim matching information.

16. MISMATCH HAZARD. Firestone and Goodyear deliberately and fraudulently misrepresented to the National Highway Traffic Safety Administration, the investigative departments of various states, and the state and federal courts that numerous components of one type or designation can be safely matched with rim components of other types and designation distributed by different manufacturers, that the configuration and specifications of the same or similar rim component parts of the same and of different manufacturers are compatible and safe, and that all extant rims are clearly, unequivocally and completely identified as to manufacturer, type and size so that the users thereof can safely match them when defendants knew that such representations were false.

17. SINGLE-PIECE RIM AS THE SAFE SOLUTION. Firestone and Goodyear deliberately and fraudulently failed to disclose that they had developed during the 1950s a completely safe single-piece drop center rim for usage on all

trucks which if promoted would entirely eliminate the rim explosion hazard and conspired among themselves and with others to keep silent with respect to the development of the state of the art in order to maintain their positions in the truck tire market, which actively was motivated solely by profit and at the expense of life and health of the public, including the plaintiffs' decedent.

18. The plaintiffs, the United States Department of Transportation, authorities in the several States and the general public reasonably relied on Firestone and Goodyear to make full and honest disclosures with respect to the design, production, distribution, warning and instruction of their truck rims and as a result of the foregoing fraudulent misrepresentations plaintiffs' decedent sustained fatal injuries from which he lingered in agony for over three weeks and eventually died to the actual damage of plaintiffs' in the sum of One Million Dollars ($1,000,000.00).

19. As a result of the foregoing fraudulent misrepresentations of Firestone and Goodyear, plaintiffs are entitled to exemplary damages in the sum of Ten Million Dollars ($10,000,000.00).

20. Most of the acts, omissions and misrepresentations of the defendants occurred or were planned at defendants' principal places of business in Akron, Ohio. Plaintiffs request that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiffs pray judgment against defendants in Count II in the sum of One Million Dollars

($1,000,000.00) actual damages and Ten Million Dollars ($10,000,000.00) punitive damages and their costs herein expended.

NIEWALD, RISJORD & WALDECK,
By /s/ JOHN C. RISJORD,
JOHN C. RISJORD
Attorneys for Plaintiffs.

DEMAND FOR TRIAL BY JURY

Plaintiffs demand trial by jury.

Complaint.

In the United States District Court for the Western District of Missouri, Western Division.

Joseph Willie Butler, Individually, Plaintiff, vs. Firestone Tire and Rubber Company, and The Goodyear Tire & Rubber Company, Defendants. Case No. 78-0647-CV-W-2.

Filed Aug. 29 1978.

COMPLAINT

COUNT I.

COMES NOW plaintiff and for Count I of his Complaint, states as follows:

1. Plaintiff is an individual citizen of the State of Mississippi, residing in Leflore County; defendants are corporations organized and existing pursuant to the laws of the State of Ohio with their principal offices for the transaction of their usual business in Akron, Summit County, Ohio, so that defendants are citizens of the State of Ohio and not citizens of Mississippi so there is complete diversity of citizenship between the parties.

2. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, to wit: Twenty-two Million Dollars ($22,000,000.00), and this Court has jurisdiction in the first instance pursuant to Section 1332(a), U.S.C.

3. At all times hereinafter alleged, defendants were duly authorized to transact business in the State of Missouri and have offices and distribution centers for their products in Kansas City, Jackson County, Missouri, within the Western Division of the Western District of Missouri.

4. On or about May 1, 1975, a multi-piece truck rim manufactured by defendants, and assembled and inflated by a person other than the plaintiff exploded at Greenwood, Leflore County, Mississippi, while plaintiff was handling

it on a vehicle causing massive injuries to plaintiff, Joseph Willie Butler, which caused him total and permanent blindness.

5. At the time of the manufacture of the multi-piece truck rim by defendants, said rim was defective in that it had a proclivity to blow apart and explode when put to the use which defendants intended and anticipated, and defendants failed to warn of said defect and failed to recall, retrofit or otherwise remedy design defects and known hazards of its multi-piece rims.

6. At the time of the explosion which blinded plaintiff, the truck rim assembly was in substantially the same condition as when manufactured by defendants, and was being used by plaintiff as the product was reasonably intended to be used and as defendants anticipated its use and because of the aforesaid defect in said assembly, it broke apart and exploded, totally and permanently blinding plaintiff, Joseph Willie Butler.

7. At the time of the design, development, manufacture, distribution, licensing and sale of the subject multi-piece rim assembly and prior to plaintiff's injury, defendants knew that the design, configuration, materials and construction of the multi-piece Firestone and Goodyear rim components presented an extreme and unusual hazard to the motoring public and particularly to anyone attempting to mount an inflated multi-piece assembly on a vehicle. In spite of the existence of known hazards and numerous serious and fatal injuries over a period of some fifty-five years, defendants Firestone Tire & Rubber Company and The Goodyear Tire & Rubber Company negligently, willfully or intentionally,

(a) failed and refused to redesign the multi-piece rims and failed to thereby preclude a mixture of parts;

(b) failed to recall such defective rims from the market

(c) failed to develop, test and distribute safety devices to prevent explosive separation of multi-piece rims;

(d) failed to warn adequately of the hazards involved in every step of the assembly and usage of such rims;

(e) failed to develop any meaningful engineering criteria for determination of proper assembly and the extent of the hazard involved in improper assembly;

(f) failed to notify users of such rims of the risk involved in standing in close proximity to or vehicle mounting of inflated assemblies;

(g) failed to replace the multi-piece assembly with safe rims of single-piece design or of safer multi-piece designs;

(h) failed to advise the United States Department of Transportation of the existence and extreme hazards presented by the defects inherent in multi-piece rims;

(i) failed to notify and fully inform the United States Department of Transportation and state agencies of the existence of the single-piece rim or of safer multi-piece rims as a solution to the problem;

(j) deliberately withheld information and gave misinformation with respect to the nature, extent, cause and serious consequences of the defects in such rims and of the feasibility of recall or retrofit, before, during and after the attempted investigation by the Office of Defects Investigation, United States Department of Transportation, and state agencies of Firestone and Goodyear multi-piece rims, and after being requested or required by the United States Department of Transportation and state agencies to develop and distribute foolproof or safe rims and to distribute adequate, clear and specific warnings with respect to such defects and hazards inherent in multi-piece rims failed to do so in a thorough, timely and specific manner;

(k) failed to discontinue production and failed to adequtely test their multi-piece rims when defendants knew that better, safer products were available and knew that adequate and appropriate tests would establish defects which permit the bursting of the parts of the said rims with resulting injuries or death;

(l) deliberately misrepresented to the Department of Transportation, state agencies, and to the general public the fact that the multi-piece rim was a defective and dangerous design concept remedial only by a total manufacturer's notification campaign, commonly known as recall or retrofit.

8. Plaintiff's left eyeball was traumatically removed and his right eyeball was partially disgorged. He suffered comminuted facial bone fractures with an air passage to his frontal lobe, severe cerebrospinal fluid leak and multiple compound comminuted fractures of the right arm rendering him totally blind and crippled which caused him great pain, mental anguish, psychological and emotional derangement and suffering.

9. Plaintiff has also been deprived of the ability to support and maintain himself and is thereby damaged in the amount of Two Million Dollars ($2,000,000.00).

10. Plaintiff states that the conduct and failures of defendants, Firestone Tire & Rubber Company and The Goodyear Tire & Rubber Company, and their individual officers and employees acting as the agents of Firestone and Goodyear, were in willful, wanton, reckless and grossly negligent disregard for the safety of the public and particularly the plaintiff in that defendants' conduct was motivated solely by profit and convenience without regard to safety or preservation of human life and was oppressive, and as a result of the aforesaid, plaintiff is entitled to exemplary damages in the sum of Twenty Million Dollars ($22,000,000.00).

11. Most of the acts, omissions and misrepresentations of the defendants occurred or were planned at defendants'

principal places of business in Akron, Ohio. Plaintiff requests that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiff prays judgment against defendants in Count I in the sum of Two Million Dollars ($2,000,000.00) actual damages, and Twenty Million Dollars ($22,000,000.00) punitive damages and his costs herein expended.

COUNT II.

COMES NOW plaintiff and for Count II of his Complaint, states as follows:

1. Plaintiff is an individual citizen of the State of Mississippi, residing in Leflore County; defendants are corporations organized and existing pursuant to the laws of the State of Ohio with their principal offices for the transaction of their usual business in Akron, Summit County, Ohio, so that defendants are citizens of the State of Ohio and not citizens of Mississippi so there is complete diversity of citizenship between the parties.

2. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, to wit. Twenty-Two Million Dollars ($22,000,000.00), and this Court has jurisdiction in the first instance pursuant to Section 1332(a), U.S.C.

3. At all times hereinafter alleged, defendants were duly authorized to transact business in the State of Missouri and have offices and distribution centers for their products in

Kansas City, Jackson County, Missouri, within the Western Division of the Western District of Missouri.

4. On or about May 1, 1975, a multi-piece truck rim manufactured by defendants, and assembled and inflated by a person other than the plaintiff exploded at Greenwood, Leflore County, Mississippi, while plaintiff was handling it on a vehicle causing massive injuries to plaintiff, Joseph Willie Butler, which caused him total and permanent blindness.

5. Plaintiff's left eyeball was traumatically removed and his right eyeball was partially disgorged. He suffered comminuted facial bone fractures with an air psssage to his frontal lobe, severe cerebrospinal fluid leak and multiple compound comminuted fractures of the right arm rendering him totally blind and crippled which caused him great pain, mental anguish, psychological and emotional derangement and suffering.

6. Defendants Firestone Tire & Rubber Company and The Goodyear Tire & Rubber Company, hereinafter referred to as Firestone and Goodyear, and certain executive officers and employees conspiring with each other and with other manufacturers defrauded plaintiff, the United States of America, the several States, state and federal courts, litigants, and the general public for the purposes of avoiding a manufacturers' notification campaign, commonly known as recall or retrofit, and avoiding liability to litigants and claimants killed, blinded, maimed and otherwise injured by multi-piece rims, over a period exceeding fifty years, including specific acts and conduct similar thereto hereafter more fully set forth.

7. POLITICAL SLUSH FUND. Firestone and Goodyear established and utilized political slush funds into which they diverted corporate assets in excess of One Million

Dollars ($1,000,000.00), which were used for illegal purposes including the avoidance of a government investigation, discontinuance of production and a recall campaign of certain multi-piece rims. During the government investigation from 1969 through 1973, Firestone and Goodyear made illegal, domestic political payments, the distribution of which was directed by company executives, which payments were utilized to influence the aforesaid government investigation and proposed action.

8. FALSE REPRESENTATIONS AS TO THE NUMBER AND SEVERITY OF RIM EXPLOSIONS. Firestone and Goodyear deliberately and fraudulently understated and minimized the number of known incidents, claims and lawsuits involving multi-piece rims in testimony and official responses to inquiries by the United States Department of Transportation, investigatory departments of various states and in various lawsuits in state and federal district courts.

9. VEHICLE MOUNTING AND DEMOUNTING HAZARD. Firestone and Goodyear deliberately and fraudulently withheld information from the United States Department of Transportation, the investigatory departments of various states and the federal district courts and state trial courts that multi-piece truck rims of the type which blinded plaintiff have a proclivity for explosion during handling, mounting and demounting on vehicles thereby causing potentially lethal explosions and injury or death to any person attempting to handle, mount or demount an inflated multi-piece rim assembly onto or from a vehicle.

10. WARNING STICKERS. Firestone and Goodyear deliberately and fraudulently conspired between themselves and with others at secret and clandestine meetings at the Mayflower Hotel in Washington, D.C. and elsewhere to remain silent and avoid adequate warning to users of multi-piece truck rim components by failing to attach warning

stickers to rims, by representing that it was impossible to devise a sticker which would be prominent and would adhere to new and existing rims, by abandoning their warning sticker projects for multi-piece rims and encouraging, agreeing and conspiring with each other and other rim manufacturers to abandon existing and proposed warning sticker programs, all for the purposes of avoiding approximately $1,000,000.00 in expense and avoiding the admission of liability for products liability rim explosion cases at the expense of human life and health including that of the plaintiff.

11. SAFETY CAGE AS THE SOLUTION. Firestone and Goodyear deliberately and fraudulently misrepresented that safety cages and other restraining devices would effectively eliminate death and injury from multi-piece rim explosions although they knew that numerous explosions resulting in blinding, maiming, crippling and death were and are occurring during vehicular mounting and demounting, while vehicles are in service and during routine tire maintenance, inflation and deflation of rim assemblies mounted on vehicles, and Firestone and Goodyear deliberately and fraudulently failed to advise and acknowledge that safety cages and restraining devices are useless at such times and would not avoid numerous rim explosion occurrences involving death and serious injury.

12. WARNING AND MATCHING LITERATURE AS THE SOLUTION. Firestone and Goodyear deliberately and fraudulently misrepresented that printed warning materials and rim component matching literature were an alternative solution to the multi-piece rim explosion hazard although Firestone and Goodyear knew that such printed literature and materials rarely reached the ultimate users and tire busters, and that explosion injuries and death would continue regardless of such literature and materials because defend-

ants never intended to distribute the literature promulgated by the federal government, failed to distribute such literature, knew that the literature was difficult or impossible for most users to comprehend, and even if disseminated and comprehended that compliance was impossible, impractical and ineffective in preventing death and injury.

13. RUN FLAT HAZARD. Firestone and Goodyear deliberately and fraudulently failed to disclose the results of tests and complaints indicating that a majority of multi-piece rim assemblies, including the type which blinded plaintiff, become missiles whenever the tire assembled thereon becomes deflated on the highway causing an unreasonable risk to the public which, if fully known to the National Highway Traffic Safety Administration, would have resulted in the promulgation of federal motor vehicle safety standards, recall and retrofit which would have eliminated the subject rim prior to the time it blinded plaintiff.

14. DISTRIBUTION OF WARNING LITERATURE AND CONSPIRACY OF SILENCE. Firestone and Goodyear deliberately and fraudulently withheld information, instructional and warning material and failed to fulfill their promises to the Department of Transportation and their obligations to the public to distribute warning literature and rim matching information.

15. MISMATCH HAZARD. Firestone and Goodyear deliberately and fraudulently misrepresented to the National Highway Traffic Safety Administration, the investigative departments of various states, and the state and federal courts that numerous components of one type or designation can be safely matched with rim components of other types and designation distributed by different manufacturers, that the configuration and specifications of the same or similar rim component parts of the same and of different manufacturers are compatible and safe, and that all extant rims are

clearly, unequivocally and completely identified as to manufacturer, type and size so that the users thereof can safely match them when defendants knew that such representations were false.

16. SINGLE-PIECE RIM AS THE SAFE SOLUTION. Firestone and Goodyear deliberately and fraudulently failed to disclose that they had developed during the 1950s a completely safe single-piece drop center rim for usage on all trucks which if promoted would entirely eliminate the rim explosion hazard and conspired among themselves and with others to keep silent with respect to the development of the state of the art in order to maintain their positions in the truck tire market, which activity was motivated solely by profit and at the expense of life and health of the public, including the plaintiff.

17. The plaintiff, the United States Department of Transportation, authorities in the several States and the general public reasonably relied on Firestone and Goodyear to make full and honest disclosures with respect to the design, production, distribution, warning and instruction of their truck rims and as a result of the foregoing fraudulent misrepresentations plaintiff sustained blinding injuries to the actual damage of plaintiff in the sum of Two Million Dollars ($2,000,000.00).

18. As a result of the foregoing fraudulent misrepresentations of Firestone and Goodyear, plaintiff is entitled to exemplary damages in the sum of Twenty Million Dollars ($20,000,000.00).

19. Most of the acts, omissions and misrepresentations of the defendants occurred or were planned at defendants' principal places of business in Akron, Ohio. Plaintiff requests that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary

damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiff prays judgment against defendants in Count II in the sum of Two Million Dollars ($2,000,000.00) actual damages and Twenty Million Dollars ($20,000,000.00) punitive damages and their costs herein expended.

CLIFF EASLEY, JR.,
YANCY & EASLEY,

NIEWALD, RISJORD & WALDECK,
By /s/ JOHN C. RISJORD,
JOHN C. RISJORD
Attorneys for Plaintiffs.

DEMAND FOR TRIAL BY JURY

Plaintiffs demand trial by jury.

Opinion and Order.

Before the Judicial Panel on Multidistrict Litigation.

In re Multi-Piece Rim Products Liability Litigation. Docket No. 362.

OPINION AND ORDER

Before John Minor Wisdom, Chairman, and Edward Weinfeld*, Edwin A. Robson*, Stanley A. Weigel, Andrew A. Caffrey*, Roy W. Harper, and Charles R. Weiner, Judges of the Panel.

Per Curiam.

Filed Jan. 18, 1978.

I. BACKGROUND

This litigation consists of nineteen actions pending in fourteen federal districts. The distribution of these actions is as follows:

Western District of Missouri	4
Northern District of Alabama	2
Eastern District of Michigan	2
Western District of Kentucky	1
District of Maryland	1
District of Massachusetts	1
Southern District of Mississippi	1
District of Nevada	1
District of New Hampshire	1
District of Oregon	1
Western District of Tennessee	1
Northern District of Texas	1
Southern District of Texas	1
Southern District of West Virginia	1

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*Judges Weinfeld, Robson and Caffrey did not participate in the decision of this matter.

These actions have all been brought to recover compensation for personal injuries or wrongful death allegedly resulting from, among other causes, the failure and separation of a multi-piece truck wheel (rim and tire assembly). The complaints in eighteen of these actions allege that a multi-piece rim assembly separated under pressure and flew apart with explosive force during tire inflation, mounting of an inflated wheel on a vehicle, or removal of an inflated wheel from a vehicle. Plaintiffs or plaintiffs' decedents in these eighteen actions were individuals who were in the proximity of the wheel when it separated, either as service persons or bystanders. The complaint in the nineteenth action (the Oregon action) alleges that a multi-piece rim assembly separated during operation of the vehicle on which the rim was being used, causing the vehicle to go out of control and strike an oncoming vehicle containing plaintiff and plaintiff's decedent. In each action, one or more of the following four manufacturers of multi-piece rim components are named as defendants: Firestone Tire & Rubber Co. (fourteen actions), Goodyear Tire and Rubber Co. (eight actions), Kelsey-Hayes Co. (three actions) and Redco Corp. (one action). Either Firestone or Goodyear is a defendant in every action. Besides the four manufacturers of multi-piece rim components, 21 other defendants are named in these actions, nineteen of which are named in only one action and two of which are named in two actions. These additional defendants include, in specific actions, the manufacturer of the tire which was included in the wheel assembly; the employers of plaintiff or plaintiff's decedent; and the manufacturers

and/or owners of the vehicle on which the wheel was located.[1]

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[1]A summary of the specific type of accident alleged and the defendants named in each of the nineteen actions follows:

Name of Action	District	Type of Accident	Defendants
Hale	W.D. Missouri	Rims separated during inflation, striking plaintiff and injuring him	Firestone
Goodwin	W.D. Missouri	Rims separated while wheel was being mounted on a truck, striking and killing plaintiff's decedent	Firestone, Goodyear
Butler	W.D. Missouri	Rims separated while wheel was being mounted on a truck, striking plaintiff and injuring him	Firestone, Goodyear
Walker	W.D. Missouri	Rims separated while wheel was being mounted on a truck, striking plaintiff and injuring him	Firestone, plaintiff's employer
McGee	N.D. Alabama	Rims separated while wheel was being removed from a fork-lift, striking plaintiff and injuring him	Goodyear, tire manufacturer, fork-lift manufacturer, plaintiff's employers
Clayton	N.D. Alabama	Rims separated during inflation, striking plaintiff and injuring him	Firestone, Kelsey-Hayes
Mawby	E.D. Michigan	Rims separated while wheel was being mounted on a vehicle, striking plaintiff and injuring him	Firestone
Johnson	E.D. Michigan	Rims separated after inflation, striking plaintiff and injuring him	Firestone
Henderson	W.D. Kentucky	Rims separated during inflation of a wheel mounted on a vehicle, striking plaintiff and injuring him	Firestone, tire manufacturer, truck manufacturer
Lantieri	D. Maryland	Rims separated while wheel was being mounted on a truck, striking plaintiff and injuring him	Goodyear, tire manufacturer

Plaintiffs allege a number of theories of relief against the various defendants in these actions. The allegations against the manufacturers of multi-piece rim components generally concern defects in the design and manufacture of multi-piece rim components and failure to warn adequately of the risks involved with multi-piece rim assemblies. All parties agree that in some instances multi-piece rim components

Barry	D. Massachusetts	Rims separated during inflation striking plaintiff and injuring him	Firestone
Smith	S.D. Mississippi	Rims separated during inflation, striking plaintiff and injuring him	Firestone, Redco, tire manufacturer, plaintiff's employers
Olsen	D. Nevada	Rims separated during inflation, striking plaintiff and injuring him	Goodyear
Dupuis	D. New Hampshire	Rims separated during removal of a wheel from a truck, striking plaintiff and injuring him	Firestone
Petersen	D. Oregon	Wheel failed while vehicle was being driven, causing vehicle to go out of control and strike an oncoming automobile containing plaintiff and plaintiff's decedent	Firestone, tire manufacturer
Davis	W.D. Tennessee	Rims separated during inflation of a wheel mounted on a vehicle, striking and killing plaintiff's decedent	Firestone, Kelsey-Hayes
Brown	N.D. Texas	Rims separated while wheel was being mounted on a vehicle, striking plaintiff and injuring him	Goodyear, tire manufacturer, plaintiff's employers
Rodriguez	S.D. Texas	Rims separated during inflation of a wheel mounted on a vehicle, striking plaintiff and injuring him	Firestone, Goodyear
Walker	S.D. West Virginia	Rims separated while wheel was being mounted on a vehicle, striking and killing plaintiff's decedent	Goodyear, owners of vehicle

manufactured by different defendants can be used interchangeably.

In addition, the complaints in three of the Missouri actions (*Hale, Goodwin* and *Butler*) allege that Firestone and/or Goodyear 1) failed to advise the United States Department of Transportation of the hazards associated with use of multi-piece rims and intentionally minimized the frequency and severity of personal injuries caused by multi-piece rims in testimony before the Department of Transportation; 2) withheld information from and gave misinformation to the Department of Transportation concerning the feasibility of a recall and retrofit of multi-piece rims; 3) maintained a political slush fund to make illegal payments for the purpose of avoiding a recall of multi-piece rims; and 4) conspired with other manufacturers to withhold the dissemination of adequate safety warnings concerning multi-piece rims.

* * *

IT IS THEREFORE ORDERED that transfer pursuant to 28 U.S.C. §1407 of the actions entitled *Odis Daniel Smith, et al. v. Adams Laboratories, Inc., et al.*, S.D. Miss., C.A. No. J76-228 (N), and *Gladys Fay Petersen v. Michelin Tire Corp., et al.*, D. Oregon, C.A. No. 77-0057, be, and the same hereby is, DENIED, and the Panel's show cause order be, and the same hereby is, VACATED insofar as it relates to these actions.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. §1407, the remaining actions listed on the following Schedule A and pending in districts other than the Western District of Missouri be, and the same hereby are, transferred to the Western District of Missouri and, with the consent of that court, assigned to the Honorable William R. Collinson for coordinated or consolidated pretrial proceedings with the actions listed on Schedule A and pending there.

Schedule A	Docket No. 362
NORTHERN DISTRICT OF ALABAMA	Civil Action No.
Gail McGee, etc., et al. v. Goodyear Tire & Rubber Co., et al.	CA78-P0090S
Thomas Clayton, et al. v. The Firestone Tire & Rubber Co., et al.	CA78-G0396S
WESTERN DISTRICT OF KENTUCKY	
Melton Henderson, et al. v. The Firestone Tire & Rubber Co., et al.	C78-0002-BG
DISTRICT OF MASSACHUSETTS	
Paul R. Barry v. Firestone Tire & Rubber Co.	77-2796-G
SOUTHERN DISTRICT OF MISSISSIPPI	
Odis Daniel Smith, et al. v. Adams Laboratories, Inc., et al.	J76-228 (N)
WESTERN DISTRICT OF MISSOURI	
Larry Hale, et al. v. Firestone Tire & Rubber Co.	78-0266-CV-W-2
Bobby C. Goodwin, et al. v. Firestone Tire & Rubber Co., et al.	78-0408-CV-W-1
Joseph W. Butler v. Firestone Tire & Rubber Co., et al.	78-0647-CV-W-2
Robert E. Walker, et al. v. Firestone Tire & Rubber Co.	75CV363-W-2

DISTRICT OF MARYLAND	
Richard W. Lantieri, et al. v. Goodyear Tire & Rubber Co., et al.	Y78-1469
DISTRICT OF NEVADA	
John L. Olsen v. Goodyear Tire & Rubber Co., et al.	77-0197-HEC
DISTRICT OF NEW HAMPSHIRE	
Patrick Dupuis v. Firestone Tire & Rubber Co.	C-76-321
WESTERN DISTRICT OF TENNESSEE	
Marion Taylor Davis, et al. v. Firestone Tire & Rubber Co., et al.	C-78-2182
NORTHERN DISTRICT OF TEXAS	
Joe B. Brown, etc. v. Goodyear Tire & Rubber Co., et al.	CA3-78-0556-D
SOUTHERN DISTRICT OF TEXAS	
Luciano Rodriguez, etc. v. Firestone Tire & Rubber Co., et al.	H-77-288
SOUTHERN DISTRICT OF WEST VIRGINIA	
Madlyn Walker v. Chemical Leaman Tank Lines, Inc., et al.	76-0350CH
EASTERN DISTRICT OF MICHIGAN	
Edward & Maxine Mawby v. Firestone Steel Products Co.	870616

Larry Johnson v. Firestone Tire & Rubber Co., Inc.	871602
DISTRICT OF OREGON	
Gladys Fay Petersen v. Michelin Tire Corp., et al.	77-0057

First Pretrial Order.

In the United States District Court for Western District of Missouri, Western Division.

IN RE: MULTI-PIECE RIM PRODUCTS, LIABILITY LITIGATION. M.D.L. Docket No. 362.

Filed Apr. 23 1979.

FIRST PRETRIAL ORDER

* * *

IV. Lead and Liaison Counsel

Plaintiffs have agreed upon a Steering Committee. In a letter to the Court dated April 10, 1979, Mr. Risjord advised "that counsel for plaintiffs who attended the first pre-trial conference agreed that in order to meet expenses of the common discovery there should be an initial assessment of $1000.00 per case filed. . . . It was agreed that the advanced monies should be deposited by liaison counsel in a separate bank account and that liaison counsel shall have authority to pay for transcripts, reimburse travel expenses and similar expenses incurred in common discovery. It is proposed that these transactions be maintained by liaison counsel on a separate ledger available for examination by all plaintiffs' counsel and an accounting report of such receipts and expenditures be made periodically to the Court." This agreement is approved. The reports shall be made quarterly. The first report shall be due September 30, 1979. The Steering Committee for plaintiffs shall consist of Messrs. Easley, Mathis, Mims, Risjord, Roden, Shulman and Stites. Mr. Risjord is lead and liaison counsel.

Mr. William Freivogel is lead counsel for The Firestone Tire and Rubber Company. Mr. William H. Sanders is liaison counsel. Mr. Alvin D. Shapiro is lead and liaison counsel for the Goodyear Tire and Rubber Company. Mr.

Robert Raymond is lead and liaison counsel for The Kelsey-Hayes Company. Mr. Thomas Wheatley is lead and liaison counsel for The Budd Company.

The non-manufacturing defendants have elected not to appoint a steering committee or to designate lead counsel. Mr. Paul Scott Kelly is liaison counsel for these non-manufacturing defendants. Mr. Kelly does not have the authority to represent any party for which he is liaison counsel only on any substantive matter. His powers and duties shall be those set forth in the "Suggested Procedural Plan of Certain Defendants for Implementation at First Pre-Trial Conference." The expenses of liaison counsel shall be shared equally by all parties for whom Mr. Kelly acts as liaison counsel. Liaison counsel is directed to present an account of his fees and expenses on a quarterly basis. The first report is due September 30, 1979.

The Court will not approve any remand, settlement, or judgment of dismissal without a showing that the involved parties have reimbursed the appropriate liaison counsel for expenses and services rendered to that date. Service of documents required by Rule 5, Fed. R. Civ. P., will be made by service on all liaison counsel.

* * *

It is so ordered.

/s/ W. R. Collinson
District Judge.

Dated: April 23, 1979

Deposition.

(Title Omitted in Printing).

In the United States District Court for the Western District of Missouri, Western Division.

[Cover page]

CONTINUED DEPOSITION OF JOHN RISJORD, produced, sworn and examined, pursuant to Notice to Take Depositions, on Friday, the 18th day of May 1979, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of that day, at the law offices of Blackwell, Sanders, Matheny, Weary & Lombardi, 600 Five Crown Center, in the City of Kansas City, County of Jackson and State of Missouri, before me.

MARY ALLEN SPALDING,
Registered Professional Reporter

and Notary Public within and for the County of Jackson, State of Missouri, in a certain cause now pending in the United States District Court for the Western District of Missouri, Western Division, IN RE: Multi-Piece Rim Products Liability Litigation, on behalf of Defendant The Firestone Tire & Rubber Company.

A P P E A R A N C E S:

For the Witness:

Niewald, Risjord & Waldeck
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
By: JOHN C. RISJORD & DANNY L. CURTIS
RONALD J. STITES
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

[Page 11, line 1 through page 11-A, line 4].

For the Firestone Tire & Rubber Company:

Blackwell, Sanders, Matheny, Weary & Lombardi
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108
By: WM. H. SANDERS & JAMES M. WARDEN

Ross, Hardies, O'Keefe, Babcock & Parsons
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
BY: WILLIAM FREIVOGEL

For Goodyear:

Stinson, Mag, Thomson, McEvers & Fizzell
2100 TenMain Center
P.O. Box 19251
Kansas City, Missouri 64141
By: ALVIN D. SHAPIRO &
PAUL E. DONNELLY

Field, Gentry, Benjamin & Robertson
600 East 11th Street
Kansas City, Missouri 64106
By: DAVID OLIVER

For Kelsey-Hayes:

Shughart, Thomson & Kilroy
9th Floor, Commerce Bank Building
922 Walnut Street
Kansas City, Missouri 64106
By: ROBERT RAYMOND

For the Budd Company:

Lathrop, Koontz, Righter, Clagett,
Parker & Norquist
Suite 2600, 2345 Grand Avenue
Kansas City, Missouri 64108
By: THOMAS J. WHEATLEY

For General Motors Corp.:

Strasburger & Price
One Main Place
Dallas, Texas 75250
By: ROLAND C. ANDERSON & ERNEST R. HIGGINBOTHAM

For Michelin:

Jackson & Sherman
820 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
By: JOSEPH A. SHERMAN

[Page 11-B lines 1 through 13]

INDEX

EXHIBITS		MARKED
No. 1	Copy of Rule 24	21
No. 2	Disciplinary Rules, Missouri Bar Judiciary	26
No. 3	Copy of newspaper article from Kansas City Times	56
No. 4	Newspaper article from Kansas City Times	57
No. 5	Letter to Ms. Lynne Smith from Danny L. Curtis, dated 10-27-77	91
Nos. 6 through 39, inclusive	No exhibits were identified in the record except Exhibit No. 32, which consisted of two pages from Martindale-Hubbell	92

[Page 12, line 1 through page 13, line 8]

THE REPORTER: I would like to have everybody's appearance, please.

Mr. Sherman, would you start first?

MR. SHERMAN: I am Joseph A. Sherman. I am appearing here for Michelin Tire.

MR. RAYMOND: Robert Raymond, for Kelsey-Hayes Company.

MR. SHAPIRO: I am Alvin Shapiro, for Goodyear.

MR. OLIVER: David Oliver, for Goodyear.

MR. DONNELLY: Paul Donnelly, for Goodyear.

MR. WARDEN: James Warden, Firestone.

MR. FREIVOGEL: William Freivogel, Firestone.

MR. WHEATLEY: Tom Wheatley, for the Budd Company.

MR. ANDERSON: Roland G. Anderson, G.M.

MR. HIGGINBOTHAM: Ernest Higginbotham, G.M.

MR. SANDERS: Danny?

MR. CURTIS: Dan Curtis, plaintiffs' attorney; Niewald, Risjord & Waldeck.

MR. SANDERS: Ronald?

MR. STITES: Ronald Stites, plaintiffs' attorney.

MR. SANDERS: For the purpose of the record, we are resuming the deposition of April 15th, 1979, of John Risjord.

JOHN RISJORD

having been previously sworn, testified further as follows:

EXAMINATION BY MR. SANDERS:

* * *

[Page 20, line 7 through page 21, line 7].

Q When were you admitted to the bar of the State of Missouri?

A 1958; April.

Q When were you admitted to the bar of the Western District of Missouri?

A Sometime that year.

Q Are you a member of the bar of the Eighth Circuit?

A I don't know that I am. At least, I don't believe I've been formally introduced to the Eighth Circuit.

Q Would you state for the record your practice in any area that you specialize in?

A Well, I practice civil trial law.

Q You consider yourself, then, a litigation or a trial lawyer?

A I suppose so.

Q How long have you engaged in that area?

A Now, I picked my first jury about two months after admission of practice, so that would be 21 years.

Q So you've tried lawsuits at least 20 years?

A 21 years.

Q You've practiced in the Western District of Missouri, United States District Court, for at least 20 years?

A Yes.

* * *

[Page 92, line 15 through page 93, line 22].

MR. SANDERS: Mark all of these exhibits, will you, in that order?

(RISJORD DEPOSITION EXHIBITS NOS. 6 THROUGH 39, INCLUSIVE, WERE MARKED FOR IDENTIFICATION.)

Q (By Mr. Sanders) I hand you Exhibits 6 through 39, and I'll ask you to look at those exhibits.

(Whereupon, proceedings were had off the record.)

Q (By Mr. Sanders) I hand you Exhibits 6 through 39. Notwithstanding your refusal to answer any documents—to answer any questions—about the document that was Exhibit 6, will you testify as to any other document, 7 through 39?

A Yes.

Q Which ones?

A Exhibit 32

Q All right. That is, for the purposes of identification—

A Seems to be a copy of our—

Q —Page 170B and 171B of Martindale-Hubbell?

A I don't know the page numbers, but it appears to be our card in the back of Martindale—

THE REPORTER: I couldn't hear the last you said. "It appears to be our card"—

THE WITNESS: Card.

THE REPORTER: Of?

MR. CURTIS: In the back of Martindale-Hubbell.

THE WITNESS: In the back section of Martindale and Hubell, my law firm's listing.

* * *

[Page 99, line 18 through page 107, line 25].

Q Now, I turn to the one exhibit between 6 and 39 that you stated that you would testify to, and that's Exhibit 32, correct?

A What's the question?

Q I said—

A You turned to it, is that the question?

Q Well, I've turned to Exhibit 32. You've said you would testify as to Exhibit 32, have you not?

A Yes.

Q All right. Now, I notice on the second page in this Martindale-Hubbell listing you list your representative insurance clients, true?

A Yes.

Q And you list as your first-named client the Home Insurance Company, true?

A The Home Insurance Company is listed; and they—under the category of "Representative Insurance Clients," they are the first.

Q And you have listed the Home Insurance Company as your client for many, many years in the Martindale-Hubbell Law Directory, have you not?

A I don't know.

Q The current Martindale-Hubbell Law Directory shows the Home Insurance Company is your first-named representative insurance client, does it not?

A Well, you represented, I thought, Exhibit 32 to be the current one, and if it is, that's true. If it's not, my judgment is, we probably list them, and whether they are first or what, I don't know.

Q How long has your firm represented the Home Insurance Company?

A The Home Insurance Company, my understanding, was a fire insurance company. We represented the Home Insurance Company—Fire Insurance Company—periodically, probably as long as I have practiced law.

Q Some 21 years?

A But I—yes. But I distinguish that from the Home Indemnity Company, which writes their casualty business, and I last did any legal work for the Home Indemnity Company when I last worked for Lowell Knipmeyer which is about 19 or 20 years ago.

Q The Home Insurance Company that you list have their corporate headquarters on Maiden Lane, in Manhattan and New York City, do they not?

A I don't know, but I suspect it's still there. At one time, they had it there.

Q Their claims office is located in your building, the Commerce Towers, is it not?

A Their local—I don't know what you call it, regional, whatever—claim office is in the Commerce Tower.

Q And that is the Home Insurance Group that has their claim office in your building?

A I think that's correct. I'm not absolutely sure whether it's the Home Group or not.

Q Larry Wagner is the claims manager?

A Was the last time I heard.

Q Bob Ozias, O-z-i-a-s, is the assistant claims manager, isn't he?

A I'm not aware of that. I know Ozias, and I know that he works for them. I thought he was their workmen's compensation man.

Q You do work for both of those—you have been associated in your representation of the Home with both Mr. Wagner and Mr. Ozias, have you not?

A I don't think so. I can't be absolutely sure—

Q It has been with Mr. Wagner, then?

A —but I doubt it. As far as I know, Joe Sherman does Ozias' comp work—his office does—and probably some of the casualty defense work, and I—I have no recollection of working directly with Wagner. I have one presently at hand—one matter—for the fire insurance company, and you know all about that, because you represented me in the same action.

Q You're talking about the—

A I'm talking about you, Bill Sanders.

Q Yes. But you're talking here about the litigation where you're suing on subrogation for the fire of a building, are you not?

A No.

Q It arises—the case with Mr. Berman?

A No.

Q What case are you referring to?

A Canova against the—a group of insurance companies, including the Home.

Q That's the case I had in mind. Mr. Berman, I believe, is the lawyer for Canova?

A No. Gene DeLeve, his partner, is one of the lawyers.

Q In your saying that I represented you there, you were referring to the fact that a—you were joined as a defendant in that action, you made demand upon your errors and omissions carrier, the St. Paul Fire & Marine, to furnish you with a defense, I was employed by the St. Paul Fire & Marine, and several years ago that action was dismissed as against you and your firm, isn't that correct?

A Is that a question?

Q Yes, sir.

A Well, that's quite a mouthful. In the first place, the action was not dismissed. I don't know what it has got to do with this lawsuit.

Q I say the action is against you for alleged libel?

A It was a suit instituted against both the insurors and my law firm, including myself, for alleged libel.

Q A motion to dismiss was filed as against you and your firm, and that motion to dismiss you and your firm was sustained, isn't that true?

A No, sir, it's not quite true. There was a motion for summary judgment filed by you, and that motion was argued, I think, by Larry McMullen, of your office, and successfully.

Q By "successfully," you mean—

A It was sustained.

Q —the summary judgment was sustained.

So you're not a party to that case any more. You continue to act as attorney for the various insurers?

A I'm not arguing with you about that.

Q And you're there representing the Home Insurance Company?

A Yes. And you learned the extent of my representation of the Home Insurance Company by the confidential relationship that we were compelled by the St. Paul Fire & Marine to enter into.

Q Well, your representation of the Home Insurance Company is not only a part of your Martindale-Hubbell listing, but the Home Insurance Company was a named defendant, was it not?

A It still is.

Q All right. And you were the attorney of record for the Home?

A That's correct.

Q You're not claiming there was anything confidential about the fact that you represented the Home in that lawsuit when you signed as the attorney of record for the Home—signed pleadings on behalf of the Home—you're not claiming that's a confidential record, are you?

A No. But I am astounded at your representation to the court that you just recently learned that I represented the Home Insurance Company—

Q You're saying—

A —since you represented me four years ago, and I explained the whole situation to you in a meeting we had in my office.

Q Now, over the last 10 years, describe to us the matters that you have handled for the Home Insurance Group.

A My best recollection is that I have just described it. I've had one case, that I can recall, in the last 10 years in which the Home Insurance Company is one of probably—

Q The Home Insurance Group or any member of it.

A The Home Insurance Company is one of probably six company defendants, and that's the—my recollection of the extent of it. It may be that one or more of my partners have from time to time done other work for the Home Insurance Company, but I sure can't tell you what it would be.

Q How long do you keep your files?

A Depends on the file.

Q Do you have a place where you keep retired files?

A These rim cases, I'm going to keep them forever.

Q Do you have a place where you store closed files?

A Yes.

Q And by checking those closed files, you could determine the nature and identification of the matters where over

the last 10 years you've represented the Home Insurance Group or any member thereof?

A Well, it wouldn't be accurate; because we don't keep them all for 10 years.

Q But it would give us an indication of some of the cases that you handled for members of the Home Insurance Group, would it not?

A Well, yes. If—for instance, if they have been involved in a major fire, there's a good likelihood that I would retain or the office would retain that file for 10 years. But I can assure you that I was totally unaware that the Firestone Tire & Rubber Company was ever insured or reinsured by the Home Insurance Company—

A You, of course—

A —and I have never, ever—and I have searched my recollection about this since you raised this question—I have no recollection of ever doing anything on behalf of any insurer for the Firestone Tire & Rubber Company or any subsidiary or affiliated company. The only way I know they were even insured was your representation of that fact.

* * *

[Page 110, lines 3-5 and page 110, line 25 through page 111, line 1].

Q. Have you furnished information on the alleged hazards of multi-piece rims to the Home Insurance Company?

* * *

A. I have not furnished anything to the Home Insurance Company.

* * *

[Page 115, line 11 through page 120, line 19].

Q Your Martindale-Hubbell listing, that we've seen in

evidence, gives the Home Insurance Company as your first-named company. You'll agree that that gives the appearance that you represent the Home Insurance Company?

A I'll agree that I do represent the Home Insurance Company in one matter; and, yes, that gives the appearance that we do represent them. The order in which they're listed, as I'm sure you know, is not indicative of anything, except that Martindale-Hubbell can't alphabetize.

Q You elected, however, to state the Home as your first-named representative insurance client?

A No.

Q Who made that election?

A I don't have the slightest notion.

Q All right. A—

A I had an election about it, and I've done it in proofs time and again; I have written, "Why don't you alphabetize the list," but they never do.

Q All right. Martindale-Hubbell—

A I don't say they never do; they haven't changed our format to alphabetize—

Q Martindale-Hubbell each year sends you a proof before it's printed, do they not?

A Yes.

Q And you look at that proof?

A Yes.

Q And the proof tells you to make any corrections that you deem appropriate?

A Yes.

Q And you have approved the Martindale-Hubbell listing as it was set forth in the proof and as it was later published, isn't that right?

A I doubt it.

Q Well, who has, in your firm?

A Well, I see the proof and comment on the proof, but that doesn't mean I approved it. And I did, for some time, attempt to get them to list the thing in some semblance of order—

Q Have you ever asked—

A —but after a few years of requesting that and not getting anywhere, you tend to give up.

Q You've never suggested to Martindale-Hubbell that they delete the Home Insurance Company as a representative insurance client?

A I can't say that I ever have or have not; I probably have not.

Q Now, have you handled for the Home Insurance Group, or any member thereof, matters that did not relate to fire insurance, but some other form of insurance?

A Well, as I told you, Lowell Knipmeyer and Glenn McCann have been the lawyers for the Home Indemnity, and primarily, the lawyers for the Home Insurance Company, for many years, that I know of. And when I worked there, about the first year of practice before I went in the service, I suppose I probably did some work for other—

Q All right. Had you—

A —company members, I'm sure the Home Indemnity, for instance, which is the casualty company. I have no recollection since that time, in the past, say, 19 years, of representing them. It's possible, but doubtful. I know that I've had a number of cases against them, including the defense of a case brought by Joe Sherman on their behalf, and not too long ago.

Q Then, if the Home Insurance Company is a company identified on the Firestone policy, you would be representing the same company that insures Firestone, would you not?

A Well, I represent the Home Insurance Company in one case involving a fire, property—first-party claim on a policy—and I don't know what connection the Firestone Tire & Rubber Company has with them. I can't speculate about it.

Q And I ask you to state over the last 10 years how many matters your law firm has handled for the Home Insurance Company?

A I can't—I do not know. It would be a very, very minimal number.

But on fires, for instance, or explosions, this type of catastrophe, where the amount of property damage is substantial, the stock insurance companies habitually split the risk, and so one tends, even though you may be initially employed by a steady client, you may represent a company for that purpose that really is the client of another law firm, simply because the companies have a custom in the insurance industry to go along with the selection of counsel made by the company that has the—that they call the lead company, which is the one that has the most insurance coverage—

Q In Exhibit—

A —and I'm sure that's the way I happened to be representing the Home Insurance Company in the one case in question.

Q In Exhibit 32, I see that your representative insurance clients are not in alphabetical order?

A I think that's established.

Q And the way your proof is submitted to Martindale-Hubbell, the Home Insurance Company is shown as the first-named insurance client?

A I don't know; but I would—could only assume that that is true, since they printed it that way.

Q You had a lawyer-client relationship, then, with the Home Insurance Company on various occasions?

A On several occasions, at least.

Q And in that capacity, you had occasion to learn something about the way the Home Insurance Company undertakes to represent its policyholders in litigation?

THE WITNESS: Let me have that again.

(Whereupon, the reporter read the pending question.)

A No, I don't think so.

Q (By Mr. Sanders) One last question—

A I don't have any recollection in the past 19 or 20 years of ever defending any Home Insurance Company insured; it's possible, but I don't know anything—

Q How about your law firm?

A —about the policy.

Q How about other members of your law firm?

A Well, I don't—I suppose it's possible that they have, but I'm unaware of it.

* * *

[Exhibit No. 32]

NIEWALD, RISJORD & WALDECK
A Professional Corporation
2500 COMMERCE TOWER
KANSAS CITY, MISSOURI 64105
Telephone:
(816) 842-3512
General Civil, Trial and
Appellate Practice
Corporation, Insurance,
Probate, Tax and
Estate Planning Law

Paul H. Niewald, born Kansas City, Missouri, April 11, 1929; admitted to bar, 1954, Missouri. Preparatory education, University of Missouri; legal education. University of Missouri (LL.B., 1954). *Fraternity:* Phi Delta Phi. *Member:* Lawyers Association of Kansas City; Kansas City and American. (Member, Section, Insurance Negligence and Compensation Law) Bar Associations; The Missouri Bar.

John C. Risjord, born Manitowoc, Wisconsin, November 7, 1933; admitted to bar, 1958, Kansas and Missouri Preparatory education. College of William & Mary (A.B., 1955); legal education, College of William & Mary and University of Wisconsin (LL.B., 1957). Vice Chairman, Fire and Inland Marine Insurance Committee of the Federation of Insurance Counsel, 1968—. *Member;* Kansas City and American (Member, Section Insurance, Negligence and Compensation Law; Vice-Chairman, Committee on Publications, 1970-1974; Property Insurance Committee Insurance Section, 1974—) Bar Associations: The Missouri Bar; Lawyers Association of Kansas City.

Michael E. Waldeck, born Eureka, Illinois, September 14, 1940; admitted to bar, 1965, Missouri. Preparatory ed-

ucation, Bradley University (B.S., 1962); legal education, University of Missouri (J.D., 1965). *Fraternity:* Phi Delta Phi. *Member:* Lawyers Association of Kansas City; Kansas City and American (Member, Section on Insurance Negligence and Compensation Law) Bar Associations; The Missouri Bar.

Danny L. Curtis, born Bragg City, Missouri, August 20, 1944; admitted to bar, 1973, Missouri. Preparatory education, Southeast Missouri State College (B.S. in B.A., 1970); legal education, University of Missouri at Kansas City. (J.D., 1973). *Fraternity:* Phi Delta Phi. *Member:* Kansas City and American Bar Associations; The Missouri Bar.

Stephen S. Brown, born Kansas City, Missouri, March 14, 1946; admitted to bar, 1971, Missouri, Preparatory education, University of Missouri (B.S.B.A., 1968); legal education, University of Missouri (J.D., 1971). *Fraternity:* Phi Delta Phi. Staff Member, University of Missouri Law Review, 1970-1971. *Member:* Kansas City and American Bar Associations; The Missouri Bar.

John L. Hayob, born Marshall, Missouri, March 21, 1950; admitted to bar, 1975, Missouri. Preparatory education, Rockhurst College (A.B., 1972); legal education, University of Missouri at Kansas City (J.D., 1975). *Fraternities:* Alpha Sigma Nu; Phi Alpha Delta. *Member:* The Missouri Bar.

Ronald K. Barker, born Lexington, Missouri, September 21, 1946; admitted to bar, 1976, Missouri. Preparatory education, University of Missouri (B.S., 1968; M.A., 1970); legal education, University of Missouri (J.D., 1976). *Fraternity:* Phi Alpha Delta (Vice Justice, 1975-1976). Member, Moot Court Board. Law Clerk to Judge James A.

Finch, Jr., Supreme Court of Missouri, 1976-1977. *Member:* Kansas City and American (Member, Sections on: Litigation; Local Government Law) Bar Associations; The Missouri Bar (Member, Young Lawyers Section); The Association of Trial Lawyers of America.

OF COUNSEL

George G. Allen, Jr., born Kansas City, Missouri, August 22, 1940; admitted to bar, 1967, Missouri. Preparatory education, University of Missouri at Kansas City (B.A., 1966); legal education University of Missouri at Kansas City (J.D., 1966). *Fraternity:* Phi Alpha Delta. *Member:* Kansas City Bar Association (Member, Committee on Workmen's Compensation, 1973-1974); The Missouri Bar (Member, Committee on Workmen's Compensation, 1971-1974); The Association of Trial Lawyers of America.

REPRESENTATIVE GENERAL CLIENTS: Southwest Grease & Oil Co.; Builders Hardware and Appliance Co.; City Volkswagen, Kansas City, Kansas; Jenkins & Blaine Construction Co., Kansas City, Missouri; Johnnie Walker Medical Electronics, Inc., Raytown, Missouri; Merriam Volkswagen, Merriam, Kansas.

REPRESENTATIVE INSURANCE CLIENTS: The Home Insurance Co.; Crum & Forster Group; Republic-Vanguard Insurance Co.; Great American Insurance Co.; Royal-Globe Insurance Group; The Hanover Insurance Group; Firemens Fund-American Insurance Group; Consolidated Mutual of Brooklyn, New York; Grain Dealers Mutual Insurance Co.; Insurance Company of North America; Mill Mutuals; Millers Mutual of Alton, Illinois; New Hampshire Insurance Co.; Northwestern National Insurance Co.; State Farm Fire Insurance Co.; Commercial Union and North British Group; Sentry-Hardware Group; American States Insurance Co.; Hartford Fire Insurance Co.; Continental National American

Group; Chubb/Pacific Indemnity Group; The Aetna Insurance Co., Shawnee Mission, Kansas; Aetna Life and Casualty Cos., Kansas City, Missouri; A.F.I.A. World Wide Insurance, New York, N.Y.; Atlantic Cos., Kansas City, Missouri; Cravens, Dargen & Co., Special Risks, Houston, Texas; Holiday Inns of America, Memphis, Tennessee; Industrial Indemnity Co., Dallas, Texas; Market Facilities, Inc., Los Angeles, California; Safeway Stores, Kansas City, Missouri; Skaggs Drug Co., Salt Lake City, Utah; State Security Insurance Co., Edwardsville, Illinois; Utica Mutual Insurance Co., Utica, New York; Western Casualty & Surety Co., Kansas City, Missouri.

REFERENCE: Commerce Bank of Kansas City, N.A.

Motion.

(Title Omitted in Printing)

In the United States District Court for the Western District of Missouri, Western Division.

MOTION OF THE FIRESTONE TIRE & RUBBER COMPANY TO DISQUALIFY JOHN C. RISJORD.

Filed: May 24, 1979.

Defendant, The Firestone Tire & Rubber Company ("Firestone"), by its attorneys, hereby moves the Court for entry of an order that John C. Risjord, the law firm of Niewald, Risjord & Waldeck, and all its partners and associates, be disqualified from further representing plaintiffs in multipiece rim cases against Firestone in which The Home Insurance Company (hereinafter, "Home") insures Firestone or in which information obtained from Home could be useful to plaintiffs.

In support of this motion Firestone attaches the Affidavits of John B. Carothers III and JuliAnn Canto and its Brief and Suggestions. In further support of this motion Firestone submits the opinion, in affidavit form, of Professor Ronald Rotunda of the University of Illinois, an expert on codes of professional responsibility for lawyers. Each affiant will be made available for deposition on these issues at the request of any party and will appear at any hearing requested by the Court.

DATED: May 23, 1979

/s/ William Freivogel,
William Freivogel, an *Attorney for The Firestone Tire & Rubber Company,*

William Freivogel,
Ross, Hardies, O'Keefe,
Babcock & Parsons,

Brief and Suggections.

(Title Omitted in Printing)

In the United States District Court for the Western District of Missouri, Western Division.

Filed: May 24, 1979.

BRIEF AND SUGGESTIONS IN
SUPPORT OF MOTION OF THE
FIRESTONE TIRE & RUBBER COMPANY TO
DISQUALIFY JOHN C. RISJORD

* * *

John A. Risjord is a partner in Niewald, Risjord & Waldeck, a Kansas City, Missouri firm of seven lawyers and one of counsel. See IV Martindale-Hubbell Law Directory 172B-173B (1979). In that law directory the firm lists two types of clients, "Representative General Clients" and "Representative Insurance Clients." In that latter category his firm lists The Home Insurance Co. as one of the firm's insurance clients. In fact, Home is listed first, out of alphabetical order and ahead of over 30 other "representative insurance clients." Moreover, the relationship between Mr. Risjord's law firm and Home is a long-standing one. Home is also listed first out of alphabetical order, as an insurance client, of a firm in which Risjord is a member, in every listing in Martindale-Hubbell, from the very latest volume, in 1979, all the way back to 1960. Even though the name of the firm or its membership may change, two items are constant, Risjord as a counsel in the firm and Home as the

first listed (and therefore presumably the most important) insurance client.[1]

* * *

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[1]See, e.g., IV Martindale-Hubbell 170B-171B (1978);
III Martindale-Hubbell 1855B (1977);
III Martindale-Hubbell 1771B (1976);
III Martindale-Hubbell 1652B-1653B (1975);
II Martindale-Hubbell 3686B-3687B (1974);
II Martindale-Hubbell 3360B (1973) (firm name now called Gordon, Adams, Niewald & Risjord);
II Martindale-Hubbell 3197B-3198B (1972);
II Martindale-Hubbell 3072B (1971);
II Martindale-Hubbell 2906B-2907B (1970);
II Martindale-Hubbell 2726B-2727B (1969);
II Martindale-Hubbell 2562B-2563B (1968);
II Martindale-Hubbell 1387B-1388B (1967);
II Martindale-Hubbell 1199B (1966);
II Martindale-Hubbell 3903-3904 (1965);
II Martindale-Hubbell 3635-3636 (1964) (firm now called Gordon, Sanders, Adams & Niewald; Risjord listed as one of the attorneys in the firm);
II Martindale-Hubbell 3373-3374 (1963);
II Martindale-Hubbell 3169-3170 (1962) (firm now called Sanders & Niewald; Risjord listed as one of the attorneys in the firm);
II Martindale-Hubbell 2939-2940 (1961) (firm now called law offices of Lewis W. Sanders; Risjord is listed as an attorney in the firm);
II Martindale-Hubbell 2721 (1960).

In 1959, Risjord is listed as an associate in a firm called Knipmeyer, McCann & Sanders. In a listing of corporations to which the firm is "Local Insurance Counsel", Home Insurance Co. is not listed at all, but the fourth listed client is Home Indemnity Co. II Martindale-Hubbell 2513-2514 (1959).

In 1958, John Risjord is not listed in Martindale-Hubbell for Kansas City, Missouri. He was admitted to the Kansas and Missouri bars in 1958.

Affidavit.

State of Illinois, County of Champaign—ss.

Affidavit of Ronald D. Rotunda in Support of Firestone's Motion to Disqualify John C. Risjord and his Firm.

Ronald D. Rotunda, being duly sworn, states as follows:

1. He is Associate Professor of Law, College of Law, University of Illinois, Champaign, Illinois 61820. His office phone number is (217) 333-3459.
2. He received his B.A., magna cum laude, from Harvard College in 1967; he received his J.D., magna cum laude, from Harvard Law School in 1970. He was assistant professor of law at the University of Illinois College of Law from 1974-77, when he was appointed associate professor of law. He was elected to the American Law Institute in December, 1977. He is also a member in good standing of the New York, Washington, D.C., and Illinois bars, and also a member of the American Bar Association and the District of Columbia Bar Association.
3. For several years at Illinois he has taught a course in Legal Ethics. The book that he uses is Morgan & Rotunda, *Problems and Materials on Professional Responsibility* (Foundation Press, 1976), with a 1978 Supplement (Foundation Press, 1978). During late summer, 1979, the 1979 Cases and Materials Supplement and the 1979 Statutory Supplement will also be published. *Problems and Materials on Professional Responsibility* is in use in approximately 60 law schools.

   He has authored or coauthored over 20 articles published in various law reviews, such as Harvard, Columbia, Virginia, Northwestern, Illinois, Texas, U.C.L.A., Georgetown, George Washington, and Cal-

ifornia (Berkeley). Those publications which relate in whole or in part to the question of legal ethics include:

The Public Interest Appellant: Limitations on the Right of Competent Parties to Settle Out of Court, 66 Nw. U. L. Rev. 199 (1971);

The Combination of Functions in Administrative Actions: An Examination of European Alternatives, 40 Ford. L. Rev. 101 (1971);

Book Review of Monroe Freedman's, Lawyers' Ethics in an Adversary System, 89 Harv. L. Rev. 622 (1976);

The Commercial Speech Doctrine in the Supreme Court, 1976 U. Ill. L. Forum 1080 (1976) (correctly predicting the Supreme Court opinion in Bates v. State Bar);

Commercial Speech and the First Amendment, 1 The Collegiate Forum 8 (Fall, 1977) (published by Dow Jones & Co. Inc.);

The First Amendment Now Protects Commercial Speech, 10 The Center Magazine: A Publication of the Center for the Study of Democratic Institutions 32 (May/June 1977);

The Word "Profession" is Only a Label—And Not A Very Useful One, 4 Learning and the Law 16 (Summer, 1977) (publication of the A.B.A. Section on Legal Education and Admissions to the Bar).

In addition, he wrote Chapter 7, "Law, Lawyers, and Managers" in *The Ethics of Corporate Conduct*, a book edited by Clarence Walton (Prentice-Hall 1977). The book collects the papers presented for the 52d American Assembly at Arden House, Harriman, N.Y., April, 1977. The American Assembly is affiliated with Columbia University. He also participated in that American Assembly.

He has also coauthored a one volume treatise, *Constitutional Law* (West Publishing Co. 1978:, with Professors Nowak and Young). Parts of the book deal with the free speech issues related to legal advertising and solicitation. He has also published a *1978 Supplement* to this Constitutional Law Handbook, and a *1979 Supplement* will be published early this fall.

He has also attended various conferences on legal ethics and given various papers on the subject around the country, and he has been involved with various A.B.A. programs and projects dealing with legal ethics. For example, in June 1978 he was on the faculty for the A.B.A. National Workshop on Disciplinary Law and Procedure; similarly he will be on the faculty for the June, 1979 ABA Workshop on Disciplinary Law and Procedure; in 1976 he participated in five videocassettes on legal ethics sponsored by the A.B.A. Consortium for Professional Education.

He is a member of the Board of Editors of the Corporation Law Review. For that journal he coauthors a series of articles dealing with the rights, duties (including ethical duties), and liabilities of corporate officers and directors.

He is presently working on a one volume treatise on legal ethics.

4. He has been retained by The Firestone Tire & Rubber Co. to render an opinion upon whether John C. Risjord and his firm may ethically participate in the cases against Firestone consolidated herein. He provided all the authorities on conflicts of interest incorporated in Firestone's Brief and Suggestions.

5. It is his opinion based in the facts contained in Firestone's Brief and Suggestions, the Code of Professional Responsibility, and the case law that the relationship between John C. Risjord and The Home Insurance Co.

constitutes a conflict of interests and a consequent appearance of impropriety which compels his and his firm's disqualification in those cases consolidated herein involving Firestone.

6. Further affiant sayeth not.

/s/ RONALD D. ROTUNDA
Ronald D. Rotunda

SUBSCRIBED AND SWORN to before me this 21st day of May, 1979.

/s/ Kathryn H. Gardner,
Notary Public,
My Commission expires: Oct 4, 1980.

Affidavit.

(Title Omitted in Printing)

State of Illinois, County of Cook.

AFFIDAVIT OF JOHN B. CAROTHERS III IN SUPPORT OF FIRESTONE'S MOTION TO DISQUALIFY JOHN C. RISJORD.

John B. Carothers III, being duly sworn, states as follows:

1. He is an associate in the law firm of Ross, Hardies, O'Keefe, Babcock & Parsons, One IBM Plaza, Chicago, Illinois 60611, telephone number 312-467-9300.

2. Among his duties is assisting in the coordination of litigation involving wheels and rims manufactured by Firestone Steel Products Company, a division of The Firestone Tire & Rubber Company (hereinafter "Firestone").

3. Among said duties has been compliance with Firestone's duties and obligations under various product liability excess insurance policies. This has included dealings with The Home Insurance Company (hereinafter "Home") which furnished excess liability insurance coverage to The Firestone Tire & Rubber Company for a number of years and up until the end of calendar year 1976. This coverage was on an "occurrence" basis, meaning that Home covered all accidents occurring through calendar year 1976, regardless of when the claim was made or the lawsuit was filed.

4. The attached documents designated Exhibits A-H are true and correct copies of letters received by Firestone and Johnson and Higgins, Firestone's insurance broker, from Home. To his knowledge, the only rim cases for which Firestone has received such letters are Risjord cases.

5. The attached Exhibits H and I are true and correct copies of pleadings in *Gipson v. Firestone* and *The Home Insurance Company v. Firestone*.

6. He personally has arranged for the organization and presentation of Firestone wheel and rim product liability files for examination by Home representatives. He is further advised that Firestone trial counsel throughout the country are in communication with representatives of Home for purposes of discussing strategy and developments in cases involving Home.

7. Further, he has personally discussed the strategy and developments in rim and wheel cases with representatives of Home.

8. At or about the time of the Show Cause Order of the Judicial Panel on Multidistrict Litigation, and at or about the time Firestone began attempting to reconcile Home's conduct in serving reservation-of-rights letters in Mr. Risjord's rim cases, Firestone learned that Mr. Risjord was an attorney for Home and listed Home prominently as one of his insurance clients. This was in October, 1978.

9. Further affiant sayeth not.

/s/ John B. Carothers III
John B. Carothers III

SUBSCRIBED and SWORN to on
this 22nd day of May, 1979.

/s/ Betty L. Carlson
Notary Public

Exhibit A.

THE HOME INSURANCE COMPANY

Manchester, New Hampshire

Executive offices: 59 Maiden Lane, New York, N.Y. 10038

October 12, 1978

Johnson & Higgins, Inc.
95 Wall Street
New York, New York 10005

Attention John B. Ahrens

Dear Mr. Ahrens:

Claim 601E566990
Insured: Firestone Tire & Rubber Company
Date of Accident: 5-22-73
Plaintiff: Goodwin

We have reviewed the captioned Complaint wherein the plaintiff alleges that Firestone Tire & Rubber Company negligently, willfully or intentionally failed to recall, develop and redesign its steel rims. Please note that any damages awarded to the plaintiff in connection with willful or intentional acts committed by Firestone Tire & Rubber Company, would not be covered under our Excess policy.

We refer you to the policy definition of occurrence, which states:

> "The term "occurrence" wherever used herein shall mean an accident or happening or event or continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence."

In light of the foregoing, The Home Insurance Company must reserve all of its rights in connection with the compensatory damages sought by the plaintiff in this case.

The Complaint also seeks relief for punitive damages alleging Firestone Tire & Rubber Company knew that the design of the steel rims posed a grave danger to the lives or property of consumers.

We must again refer you to the policy definition of "occurence" stated above, and we must advise you that The Home Insurance Company will not satisfy any judgment rendered against Firestone Tire & Rubber Company for punitive damages.

Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,

/s/ Leonard Brown
Leonard Brown
Assistant Manager
Excess Claims

LB:mw

Exhibit B.

THE HOME INSURANCE COMPANY

Manchester, New Hampshire

Executive offices: 59 Maiden Lane, New York, N.Y. 10038

October 12, 1978

Johnson & Higgins, Inc.
95 Wall Street
New York, New York 10005

Attention John B. Ahrens

Dear Mr. Ahrens:

File 311E738460
Insured: Firestone Tire & Rubber Company
Date of Accident: May 1, 1975
Plaintiff: Joseph Willie Butler

We have reviewed the captioned Complaint wherein the plaintiff alleges that Firestone Tire & Rubber Company negligently, willfully or intentionally failed to recall, develop and redesign its steel rims. Please note that any damages awarded to the plaintiff in connection with willful or intentional acts committed by Firestone Tire & Rubber Company, would not be covered under our Excess policy.

We refer you to the policy definition of occurrence, which states:

> "The term "occurrence" wherever used herein shall mean an accident or happening or event or continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions excess at or emanating from one premises location shall be deemed on occurrence."

In light of the foregoing, The Home Insurance Company must reserve all of its rights in connection with the compensatory damages sought by the plaintiff in this case.

The Complaint also seeks relief for punitive damages alleging Firestone Tire & Rubber Company knew that the design of the steel rims posed a grave danger to the lives or property of consumers.

We must again refer you to the policy definition of "occurrence" stated above, and we must advise you that The Home Insurance Company will not satisfy any judgment rendered against Firestone Tire & Rubber Company for punitive damages.

Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,

/s/ Leonard Brown

Leonard Brown

Assistant Manager

Excess Claims

LB:mw

Exhibit C.

April 17, 1979

Johnson & Higgins, Inc.
95 Wall Street
New York, New York 10005

Attention Mr. J. Ahrens

Dear Mr. Ahrens:

Herbert Ruderman vs. Firestone
Tire and Rubber Company
Nassau County, New York

We acknowledge receipt of your first report on the above-captioned claim.

A review of the Summons and Complaint reveals that our insured is requesting recissional damages. We refer you to Exclusion B, which states that there would be no coverage provided for the recall or replacement of our insured's product.

There is also an allegation that the insured intentionally ignored public policy and demonstrated a disregard for human life.

There will be no coverage for this type of claim. We refer you to the policy definition of "Occurrence".

Therefore, we will not satisfy any judgment rendered against Firestone Tire and Rubber Company for these damages.

Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,

/s/ Francis Lynch
Francis Lynch
Supervisor
Excess Claims
Claim Department

FL:me

Exhibit D.

April 17, 1979

Johnson & Higgins, Inc.
95 Wall Street
New York, New York

Attention Jack Ahrens

Dear Mr. Ahrens:

Diane Perry vs. Firestone Tire
& Rubber Co.
Superior Court, California

We acknowledge receipt of the first report on the above captioned claim. A review of the Summons and Complaint reveals the plaintiff seeks damages for injunctive relief. In addition, it is alleged Firestone Tire & Rubber Company intentionally misrepresented its products. There is no coverage for injunctive relief under our policy of insurance.

Intentional acts are not covered by our policy of insurance. We refer you to the definition of occurrence.

Therefore, we will not satisfy any judgment rendered against you for these damages.

Please convey our position to the insured and provide me with a copy of the covering letter.

Very truly yours,

/s/ Francis Lynch
Francis Lynch
Supervisor
Excess Claims

FL:mw

Exhibit E.

April 17, 1979

Johnson & Higgins, Inc.
95 Wall Street
New York, New York 10005

Attention: J. Ahrens

Dear Mr. Ahrens:

William Kealthy vs
Firestone Tire & Rubber Company
Santa Clara, California

We acknowledge receipt of the first report in the above captioned claim. A review of the Complaint reveals the plaintiff seeks relief for damages due to the intentional misrepresentation of Firestone Tire & Rubber Company. The plaintiff also seeks relief for punitive damages.

There would be no coverage for intentional acts. We refer you to the policy definition of Occurrence.

Section 533 of the California Insurance Law states, "An insurer is not liable for losses caused by willful acts of an insured." California Law provides the punitive damages may only be recovered when the defendant has been guilty of an oppression, fraud or malice, expressed or implied. (Civil Court, Section 3294).

This section has been interpreted by California Law as follows:

"The act complained of must not only be willful in the sense of intentional, but must be accompanied by some aggravating circumstances amounting to malice and there must be an intent to vex, annoy or injure. Even gross negligence is not sufficient to satisfy such an award." (Gambo vs Ashe 153 California APP. 2nd 517).

As defined, it is clear that a willful act conceived through malice is required to recover punitive damages. As previously stated above, such willful acts preclude insurance coverage by reasons of California Insurance Code 533. Therefore we will not satisfy any judgment rendered against our insured for these damages.

Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,

/s/ Francis Lynch,
Francis Lynch
Supervisor—Excess Claims
Claim Department

FL:gr

Exhibit F.

April 17, 1979

Johnson & Higgins
95 Wall Street
New York, New York

Attention Mr. J. Ahrens

Dear Mr. Ahrens:

Alan Echmann and Others
vs. Firestone Tire and Rubber Company
of California

We acknowledge receipt of the first notice of loss on the above-captioned claim. A review of the Complaint reveals the plaintiff seeks damages for personal injury and property damage claims. No specific amounts or dates of loss are listed therefore, we cannot at this time, determine if the claims would fall within our policy period.

In addition, reimbursement for the cost of defective tires are sought. Please refer to Exclusion B of your policy of insurance. There is no coverage for this type of claim.

There is also a cause of action for punitive damages.

Section 533 of the California Insurance Law states, "An insurer is not liable for losses caused by willful acts of an insured." California law provides that punitive damages may only be recovered when a defendant has been guilty of an oppression, fraud or malice, expressed or implied. (Civil Court Section 3294).

This Section has been interpreted by California law as follows:

> "The act complained of must not only be willful in the sense of intentional but must be accompanied by some aggravating circumstances amounting to malice, and there must be an intent to vex, annoy or injure. Even

gross negligence is not sufficient to satisfy such an award.''

(Gambo vs. Ashe 15A California App. 2d. 517).

As defined it is clear that a willful act conceived through malice is required to recover punitive damages. As previously stated above, such wilful acts preclude insurance coverage by reason of the California Insurance Code 533. Therefore, we will not satisfy any judgment rendered against our insured for these damages.

Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,

/s/ Francis Lynch
Francis Lynch
Supervisor
Excess Claims
Claim Department

FL:me

Exhibit G.

April 17, 1979

Johnson & Higgins, Inc.
95 Wall Street
New York, New York

Attention Mr. J. Ahrens

Dear Mr. Ahrens:

Joan Levine Gall vs Firestone Tire
& Rubber Company
Hamilton County, Ohio

We acknowledge receipt of the first notice of claim on the above captioned case. A review of the summons and complaint reveals the plaintiff seeks injunctive relief and intentionally concealed defects in their products. Injunctive relief would not be covered by our policy since it does not fall within the policy definitions of property damage or personal injury.

In addition, there would be no coverage for intentional acts. We refer you to the policy definition of "Occurrence".

Therefore, we will not satisfy any judgment rendered against the insured for these damages. Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,

/s/ Francis Lynch
Francis Lynch
Supervisor
Excess Claims

FL:sg

Exhibit H.

Frank S. Gipson, vs. Calhoun-Smith Distributing Co., Inc., *et al.* NO. 277,698.

In the District Court of Travis County, Texas, 250th Judicial District.

PETITION IN INTERVENTION.

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES The Home Insurance Company, a corporation duly authorized to do business under the laws of the State of Texas, and as an additional Plaintiff, files this its Petition In Intervention.

I.

Prior to the filing of the Original Petition herein and prior to the occurrence of the events giving rise to this cause of action as set forth in Plaintiff's Original Petition, The Home Insurance Company had issued a policy of workers' compensation insurance to Brenlan Utilities and Excavation Company, the employer of Frank S. Gipson. Such policy of insurance was in full force and effect on the date of the accident alleged in Plaintiff's Original Petition, and as a consequence of the injuries suffered by Frank S. Gipson, Plaintiff In Intervention has at this time paid an amount in excess of the minimum jurisdictional limits of this Court in weekly compensation benefits and medical and related expenses.

By virtue of such payments, The Home Insurance Company is subrogated to the rights of Frank S. Gipson as against the Defendants, Calhoun-Smith Distributing Co., Inc. and Firestone Tire and Rubber Company, and the purpose of this plea of intervention is to assert and secure enforcement of such rights.

II.

Plaintiff In Intervention adopts, all and singular, the allegations contained in Plaintiff's Original Petition the same as though they were set forth herein in their entirety.

III.

Plaintiff In Intervention says further that although it is entitled to recover under subrogation the amount it has expended for workers' compensation benefits and medical and related expenses, the fact that it has made such payments and is entitled to the recovery thereof in this cause of action, is not material to the issues involved in this case; and that to read this plea of intervention to the jury, or to otherwise inform the jury of the existence of such subrogation right, would prejudice and inflame the minds of the jury against the Plaintiff and would be contrary to the laws governing such actions.

Therefore, Plaintiff In Intervention addresses this plea of intervention to the Court only and moves the Court to instruct the Defendants not to directly or indirectly inform the jury at the trial of this case of the payments made by Plaintiff In Intervention, or the fact that such subrogation right is asserted herein.

WHEREFORE, Plaintiff In Intervention prays that the Defendants herein be served with a copy of this plea of intervention, that the fact of such intervention be concealed from the jury, that Plaintiff In Intervention reserve the right to amend these pleadings to conform to future expenses that will be incurred by them, and that they have judgment for

their damages, and such other and further relief as it may show itself entitled to recover.

Morris & Ausley,
/s/ By Charles Morris,
Charles Morris
Attorneys for Plaintiff in Intervention.

Frank S. Gipson, vs. Calhoun-Smith Distributing Co., Inc., et al. No. 277,698.

In the 250th Judicial District Court of Travis County, Texas.

FIRST AMENDED PETITION IN INTERVENTION.

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES The Home Insurance Company, a corporation duly authorized to do business under the laws of the State of Texas, and as an additional Plaintiff, files this its Petition In Intervention.

I.

Prior to the filing of the Original Petition herein and prior to the occurrence of the events giving rise to this cause of action as set forth in Plaintiff's First Amended Original Petition, The Home Insurance Company had issued a policy of workers' compensation insurance to Brenlan Utilities and Excavation Company, the employer of Frank S. Gipson. Such policy of insurance was in full force and effect on the date of the accident alleged in Plaintiff's First Amended Original Petition, and as a consequence of the injuries suffered by Frank S. Gipson, Plaintiff In Intervention has at this time paid an amount in excess of the minimum jurisdictional limits of this Court in weekly compensation benefits and medical and related expenses.

By virtue of such payments, The Home Insurance Company is subrogated to the rights of Frank S. Gipson as against the Defendants, Calhoun-Smith Distributing Co., Inc., Firestone Tire and Rubber Company, and Kelsey-Hayes Co., and the purpose of this plea of intervention is to assert and secure enforcement of such rights.

II.

Plaintiff In Intervention adopts, all and singular, the allegations contained in Plaintiff's First Amended Original Petition the same as though they were set forth herein in their entirety.

III.

Plaintiff In Intervention says further that although it is entitled to recover under subrogation the amount it has expended for workers' compensation benefits and medical and related expenses, the fact that it has made such payments and is entitled to the recovery thereof in this cause of action, is not material to the issues involved in this case; and that to read this plea of intervention to the jury, or to otherwise inform the jury of the existence of such subrogation right, would prejudice and inflame the minds of the jury against the Plaintiff and would be contrary to the laws governing such actions.

Therefore, Plaintiff In Intervention addresses this plea of intervention to the Court only and moves the Court to instruct the Defendants not to directly or indirectly inform the jury at the trial of this case of the payments made by Plaintiff In Intervention, or the fact that such subrogation right is asserted herein.

WHEREFORE, Plaintiff In Intervention prays that the Defendants herein be served with a copy of this plea of intervention, that the fact of such intervention be concealed from the jury, that Plaintiff In Intervention reserve the right to amend these pleadings to conform to future expenses that will be incurred by them, and that they have judgment for

their damages, and such other and further relief as it may show itself entitled to recover.

Morris & Craven,
By /s/ Charles Morris,
Charles Morris
Attorneys for Plaintiff
in Intervention.

(Certificate of service omitted in printing).

Frank S. Gipson, vs. Calhoun-Smith Distributing Co., Inc.; The Firestone Tire & Rubber Company. No. 277,698.

In the 250th Judicial District Court of Travis County, Texas.

COUNTERCLAIM.

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant, the Firestone Tire & Rubber Company, and makes and files this its counterclaim against the intervening plaintiff, the Home Insurance Company, and as grounds therefor would respectfully show unto the Court the following:

I.

The Firestone Tire & Rubber Company (hereinafter "Firestone") is an Ohio corporation qualified to do and doing business in the State of Texas. The Home Insurance Company (hereinafter "Home"), plaintiff in intervention herein, is and was at all material times a corporation engaged in the business of insurance and reinsurance and duly authorized to do and doing business in the State of Texas. Service upon Home may be had by serving the Texas Commissioner of Insurance.

II.

At all material times Firestone was and is in the business of manufacturing, distributing and selling various products, including metal motor vehicle rims and wheels. Beginning on or about March 1, 1973, the Home issued policies of product liability insurance to Firestone. Under said policies, the Home insured Firestone in excess of a designated retention amount against liability for personal injuries or property damage arising from Firestone's products. Under the provisions of those policies, the Home demanded and received, and continues to receive, confidential information,

records, and documents from Firestone. The Home has and maintains files containing such information, which information includes the legal contentions and defenses of Firestone to the various product liability cases and claims brought against it. Said confidential information is directly applicable and relevant to, among other things, the product made the basis of this suit.

III.

By virtue of the contractual undertaking of the Home to insure Firestone, the Home stands in a fiduciary relationship to Firestone. Because of the aforesaid policies, and because of an implied covenant of good faith and fair dealing arising out of the said policies, the Home is obligated to avoid any conflict of interest or potential conflict of interest with Firestone and to refrain from using information and documents acquired from Firestone to Firestone's detriment.

IV.

Despite this fiduciary duty owed by Home to Firestone, the Home has filed the present intervention claim against Firestone. In asserting this claim, the Home is acting in violation of its fiduciary duty and implied covenant of good faith and fair dealing.

V.

In addition, Firestone is informed and believes, and based upon such information and belief, alleges that the Home has engaged in and is engaging in other acts and conduct adverse to the interest of Firestone, all in violation of its aforesaid fiduciary duty. For example, the Home has demanded information, records, and documents from Firestone which contain the legal contentions and defenses of Firestone, while simultaneously insuring persons with positions ad-

verse to Firestone in products liability cases involving the same manufactured products. The Home has also become active in the affairs of trade associations, trade organizations and trade institutes which had and have interests adverse to Firestone, all without disclosing such adverse and conflicting interests to Firestone.

VI.

By reason of the foregoing breaches of fiduciary duty by the Home, Firestone has sustained damages far in excess of the minimum jurisdictional limits of this Court, for which it seeks compensation. In addition, unless the Home, its officers, agents, representatives, servants and employees are enjoined and restrained from further violations, Firestone will suffer and sustain irreparable losses and injury in the future, for all of which there is no adequate remedy at law.

VII.

The controversies which have arisen between the Home and Firestone are actual, present, and justiciable, thereby entitling Firestone to declaratory relief.

WHEREFORE, PREMISES CONSIDERED, Firestone respectfully prays that the Home Insurance Company be cited to appear and answer this counterclaim, that upon hearing hereof the Court enter its award and judgment denying all relief to the Home for the intervention claim it asserts herein, that Firestone be awarded a money judgment for its damages as they may appear at the trial hereof, that a judgment be entered determining and declaring the rights and liabilities of the parties to the aforesaid insurance policies in accordance with the allegations herein, that the Home be permanently enjoined and restrained from further breaches and violations of its fiduciary duty to Firestone,

for costs of Court, and for such other and further relief, in law or in equity, to which Firestone may show itself to be justly entitled.

Respectfully submitted,

Brown, Maroney, Rose,
Baker & Barber,
/s/ By Wayne Prescott,
Attorneys for Defendant and Counter-claimant, The Firestone Tire & Rubber Company.

(Certificate of service omitted in printing).

Exhibit I.

SUPERIOR COURT OF CALIFORNIA—CITY AND COUNTY OF SAN FRANCISCO.

THE HOME INSURANCE COMPANY, a corporation, Plaintiff vs. THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, DOES I through X, inclusive, Defendants. No. 733845,

Filed: Feb 6 1978.

Plaintiff alleges:

COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT AND NEGLIGENCE

FIRST CAUSE OF ACTION.

1. The true names and capacities of defendants sued herein as DOES I through X, inclusive, are unknown to plaintiff who, therefore, sues such defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each defendant is negligently responsible in some manner for the events herein referred to and alleges that each defendant is also responsible for bad faith and for breach of contract for the events herein referred to, which caused injury and damages proximately thereby to plaintiff.

2. Plaintiff, THE HOME INSURANCE COMPANY (hereinafter "HOME"), is a corporation duly authorized to do and doing business in the State of California.

3. Defendants THE FIRESTONE TIRE & RUBBER COMPANY (hereinafter "FIRESTONE") and DOES I through V, inclusive (hereinafter collectively "the present defendants"), and each of them, are corporations or other business entities duly authorized to do and doing business in the State of California.

4. HOME is informed and believes and thereon alleges that the present defendants, and each of them, are, and were

at all times herein mentioned, the agent or principal of each of the other present defendants, and each of them, and were, at all time herein mentioned, acting within the course and scope of their said agency.

5. On or about March 3, 1973, HOME issued to the present defendants, and each of them, a certain policy of comprehensive liability and indemnity insurance, Policy No. HEC 4429222 (hereinafter "the policy"), with a policy period commencing March 1, 1973. The policy provided for the payment by HOME to the present defendants, and each of them, for an ultimate net loss in excess of a Five Hundred Thousand Dollar ($500,000.00) retention by the present defendants, and each of them, up to a maximum of Ten Million Dollars ($10,000,000.00).

6. The policy further provided, in part:

ASSISTANCE AND COOPERATION

The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the insured but The Company shall have the right and shall be given the opportunity to associate with the insured or the insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involve The Company, in which event the insured and The Company shall co-operate in all things in the defense of such claim, suit or proceeding.

. . .

LOSS PAYABLE:

Liability under this policy with respect to any occurrence shall not attach unless and until the insured, or the insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The insured shall make a definite claim

for any loss for which The Company may be liable under the policy within twelve (12) months after the insured shall have paid an amount of ultimate net loss in excess of the amount borne by the insured or after the insured's liability shall have been fixed and rendered certain either by final judgment against the insured after actual trial or by written agreement of the insured, the claimant, and The Company. If any subsequent payments shall be made by the insured on account of the same occurence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

7. The policy contained a mutual, implied covenant of good faith and fair dealing on the part of both HOME and the present defendants, and each of them, and, in particular, contained an implied covenant that the present defendants, and each of them, by retaining the power to control litigation through selection of counsel, to determine discovery, determination of whether to institute settlement negotiations, to determine whether to accept or reject settlement offers and to determine ultimately whether to settle or try individual suits, impliedly agreed to perform those obligations in good faith and in due consideration for both their own interests and the interests of HOME.

8. The present defendants, and each of them, impliedly contracted and covenanted to perform each of the foregoing obligations including, in particular, the duties to initiate settlement negotiations, to determine whether to accept or reject settlement offers, and to determine whether to settle or try individual suits, in the particular county where the particular suit was filed.

9. On or about July 16, 1973, while the policy was in effect, an automobile equipped with tires manufactured by FIRESTONE and DOES VI through X, inclusive, and each of them, and operated by ANNA AKINCI was involved in an accident on California Interstate No. 5 near Los Banos that resulted in serious and permanent personal injuries to the occupants.

10. Thereafter, three lawsuits were filed in the Superior Court of the State of California in and for the City and County of San Francisco against FIRESTONE and DOES VI through X, inclusive, claiming damages for the injuries and wrongful death occurring in said accident.

11. Pursuant to the terms of the policy the present defendants, and each of them, assumed defense of the lawsuits.

12. The lawsuits were eventually consolidated under the title of "ANNA AKINCI, et al., Plaintiffs, vs. THE FIRESTONE TIRE & RUBBER COMPANY, et al., Defendants", No. 677117, in the City and County of San Francisco, State of California (hereinafter "the consolidated actions"), and the consolidated actions were tried beginning July 18, 1977.

13. In the investigation and preparation for defense of the consolidated actions, the present defendants, and each of them were aware independently, and as advised by attorneys retained by them, that the injuries received by the plaintiffs in the consolidated actions were serious, horrible, permanent, and were in effect of a catastrophic nature; defendants were further aware and were advised that the liability of the present defendants, and each of them, was probable and that there was a great danger of a recovery by plaintiffs far in excess of the Five Hundred Thousand Dollars ($500,000.00) retention and, further, that a judgment in favor of the consolidated plaintiffs would greatly exceed

both said retention limits of Five Hundred Thousand Dollars ($500,000.00) and the demand of One Million Six Hundred Twenty-Five Thousand Dollars ($1,625,000.00).

14. The present defendants, and each of them, failed to initiate settlement negotiations in the consolidated actions as required by their implied contractual obligations with HOME, and the present defendants, and each of them, failed to evaluate and respond in good faith, as required by their implied contractual obligations with HOME, to settlement demands made in San Francisco County and possibly elsewhere by the plaintiffs in the consolidated actions.

15. As a proximate result of the above-described failures on the part of the present defendants, and each of them, the consolidated actions were not settled prior to trial although they could and should have been settled prior to trial for One Million Six Hundred and Twenty-Five Thousand Dollars ($1,625,000.00) and instead proceeded to trial and a resultant judgment of Three Million Eighteen Thousand Dollars ($3,018,000.00) which judgment was ultimately satisfied for Two Million Eight Hundred and Twenty-Five Thousand Dollars ($2,825,000.00), and of which proximately damaged HOME, in that HOME was required to pay a much greater sum to satisfy the judgment than HOME would have been required to pay had the present defendants, and each of them, conducted good faith settlement negotiations and entered into a good faith pre-trial settlement with plaintiffs in the consolidated actions. The exact amount of HOME's damage is unknown, but is it known that the total is in excess of One Million Dollars ($1,000,000.00) and HOME will pray leave to insert the exact amount when the same is ascertained.

WHEREFORE, HOME prays judgment as hereinafter set forth.

SECOND CAUSE OF ACTION.

16. HOME here incorporates as though set forth in full Paragraphs 1 through 13, inclusive, of the First Cause of Action.

17. Shortly before commencement of the trial of the consolidated actions, in the County of San Francisco, the Attorneys for the plaintiffs in the consolidated actions submitted a settlement demand to the present defendants, and each of them, for the settlement of all claims in the consolidated action for the total sum of One Million Six Hundred Twenty-Five Thousand Dollars ($1,625,000.00), indicating that the consolidated actions could be settled for that figure or for a lesser figure.

18. Approximately three (3) days prior to the commencement of the trial of the consolidated actions, HOME, suspecting that the present defendants, and each of them, were not fulfilling their implied good faith obligations under the policy, made demand upon the present defendants, and each of them, to release the Five Hundred Thousand Dollar ($500,000.00) retention, so that negotiations towards a settlement could commence.

19. The present defendants, and each of them, failed and refused to release the Five Hundred Thousand Dollar ($500,000.00) retention, thus breaching both the implied covenant of good faith and the express requirement in the policy that the present defendants, and each of them, cooperate with HOME whenever HOME exercise its right to associate in the control of any claim, suit or proceeding relative to an occurrence where the claim or suit involved or appeared reasonably likely to involve the sums in excess of the present defendants' retention.

20. Thereafter HOME made further written and oral demands to the present defendants, and each of them, to

release the amount of the retention so that settlement negotiations could proceed and so that the consolidated actions could be settled within the amount for which the plaintiffs in the consolidated actions had offered to settle.

21. The present defendants, and each of them, refused to release the retention, refused to negotiate in good faith for the settlement of the consolidated actions, and during the trial of the consolidated actions advised HOME that the present defendants, and each of them, would release the retention only upon conditions not contained in the policy, namely that HOME promise not to cancel the policy and that defendants would retain the right to make the ultimate decision as to the amount which could be paid in settlement of the consolidated actions.

22. Ultimately, the present defendants, and each of them, agreed to release the retention, but by the time they did so, the plaintiffs in the consolidated actions had withdrawn their One Million Six Hundred and Twenty-Five Thousand Dollar ($1,625,000.00 offer, and instead demanded more than Two Million Three Hundred Thousand Dollars ($2,300,000.00) to settle the consolidated action

23. Thereafter, one of the consolidated plaintiff's claims was settled for the total sum of Three Hundred Ten Thousand Dollars ($310,000.00); but while HOME was attempting to evaluate the settlement demands of the other consolidated plaintiffs, those plaintiffs withdrew all settlement demands, refused to negotiate with HOME and required that the trial proceed to verdict and judgment.

24. On or about August 19, 1977, a verdict was rendered by the jury in favor of all remaining plaintiffs in the consolidated actions and against defendant FIRESTONE and DOES VI through X, and each of them, in the sum of Three Million Eighteen Thousand Dollars ($3,018,000.00).

25. Prior to the determination of a motion for new trial in the consolidated actions, the non-settling plaintiffs in the consolidated actions agreed to and did accept settlements in full satisfaction of said judgments in the sum of Two Million Eight Hundred Twenty-Five Thousand Dollars ($2,825,000.00).

26. The present defendants, and each of them, by their unreasonable and arbitrary refusal to respond in good faith to the One Million Six Hundred and Twenty-Five Thousand Dollar ($1,625,000.00) offer of the plaintiffs in the consolidated action and their refusal to release their policy retention so that HOME could respond to that demand, breached their express and implied contractual obligation to HOME and were guilty of bad faith in their failure to conduct good faith settlement negotiations and in their defense of said action.

27. As a direct and proximate result of the failure of the present defendants, and each of them, to comply with the express and implied terms of the policy, including the duty to exercise good faith, care, skill and diligence for the protection of HOME's rights, as entrusted to defendants under the terms of the policy, HOME was ultimately forced to pay to settle the consolidated actions an amount that greatly exceeded the amount that HOME would have been required to contribute had the present defendants and each of them, conducted good faith settlement negotiations with plaintiffs in the consolidated actions or promptly released the retention so that HOME could conduct such negotiations. The exact amount of HOME's damage is unknown, but it is known that the total is in excess of One Million Dollars ($1,000,000.00), and HOME will pray leave to insert the exact amount when the same is ascertained.

WHEREFORE, HOME prays judgment as hereinafter set forth.

THIRD CAUSE OF ACTION.

28. HOME here incorporates by reference as though set forth in full the First Cause of Action in its entirety.

29. The present defendants, and each of them, were negligent in their conduct of the defense and control of the consolidated actions, and HOME was proximately damaged thereby.

WHEREFORE, HOME prays judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION.

30. HOME here incorporates by reference as though set forth in full Paragraphs 1 through 13, inclusive, of the First Cause and the Second Cause of Action in its entirety.

31. The present defendants, and each of them, were negligent in their failure to respond in good faith to the One Million Six Hundred and Twenty-Five Thousand Dollar ($1,625,000.00) offer by the plaintiffs in the consolidated actions, and in their failure to promptly release their retention when requested to do so by HOME, and their failure to cooperate with HOME when HOME exercised its right to associate in the defense and control of the consolidated actions, and HOME was proximately damaged as a result of this negligence.

WHEREFORE, HOME prays judgment against defendants as follows

1. For special damages, according to proof, together with interest theron;

2. For attorneys' fees incurred herein;

3. For costs of suit; and

4. For such other and further relief as the Court deems just and proper in the premises.

NICHOLS, WILLIAMS, MORGAN
& DIGARDI,
By (NOT SIGNED),
Attorneys for plaintiff.

Brief and Suggestions.

(Title omitted in Printing)

In the United States District Court for the Western District of Missouri, Western Division.

BRIEF AND SUGGESTIONS IN OPPOSITION TO THE MOTION OF FIRESTONE TIRE & RUBBER COMPANY TO DISQUALIFY JOHN C. RISJORD.

I.

THERE IS NO SUBSTANTIAL RELATION BETWEEN ATTORNEY RISJORD'S REPRESENTATION OF THE HOME INSURANCE COMPANY AND THE PRESENT LITIGATION.

The deposition of attorney Risjord establishes that the only matter in which he represented the Home Insurance Company in the past ten years was Cannova Enterprises, Inc., et al. vs. Great Americal Insurance Company of America, et al., No. 782397, in the Circuit Court of Jackson County, Missouri. This case arose from a fire at Mr. C's Restaurant on December 24, 1973, and is a claim for property loss on policies of fire insurance with the asserted defense that the fire was incendiary. Home Insurance Company is one of six companies involved in the suit. This suit is so obviously unrelated to the instant litigation that Firestone counsel declined to examine attorney Risjord during his deposition concerning the nature of the suit or the existence of any confidential communication between him and the Home Insurance Company. This essential element that counsel received some confidence substantially related to the instant litigation is totally lacking and demonstrates once again the extremes to which Firestone is prepared to go to delay and obstruct these proceedings.

* * *

Affidavit

(Title Omitted in Printing)

In the United States District Court for the Western District of Missouri, Western Division.

Filed: July 3, 1979

***

AFFIDAVIT OF COLIN SMITH.

COLIN SMITH, being duly sworn, states as follows:

1. He is a law student at Washington University, St. Louis, Missouri. He is currently a law clerk at the firm of Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Illinois.

2. On June 25, 1979, he was instructed to conduct a search of the files of the Corporate Insurance Department of The Firestone Tire & Rubber Company in Akron, Ohio, in order to determine whether, prior to the deposition of John C. Risjord on May 18, 1979, Firestone had ever received a letter from a Home Insurance Company official or anyone else on Home Indemnity Company stationary. He could find no such letter.

3. The only letter he could find on Home Indemnity Company stationary was a letter to Firestone's Law Department dated May 30, 1979, twelve days after the Risjord deposition. It is attached minus the text. Also attached minus the text is another letter to Firestone's Law Department dated February 1, 1979, signed by the same person (Francis Lynch) on Home Insurance Company stationary. This latter

(February 1) stationary is identical to all other stationary received by Firestone prior to the Risjord deposition.

Further, affiant sayeth not.

/s/ Colin Smith

Subscribed and Sworn to
before me this 29th day
of June, 1979
/s/ Mary J. Schneider
Notary Public

THE HOME INDEMNITY COMPANY
Manchester, New Hampshire

Executive offices: 59 Maiden Lane, New York, N.Y. 10038

May 30, 1979

Firestone Tire & Rubber Co.
1200 Firestone Parkway
Akron, Ohio 44317

Att: Joseph E. Downs
Asst. Counsel

Very truly yours,

/s/ Francis Lynch
Francis Lynch, Supv.
New York Excess Claims

FL/ab
cc: Mr. Kleinhenz
Mr. Hilton

THE HOME INSURANCE COMPANY
Manchester, New Hampshire

Executive offices: 59 Maiden Lane, New York, N.Y. 10038

February 1, 1979

Firestone Tire & Rubber Company
1200 Firestone Parkway
Akron Ohio 44317

Attention Joseph E. Downs,
Legal Department

Very truly yours,

/s/ Francis Lynch
Francis Lynch
Supervisor
Excess Claims

FL:aw

Transcript.

(Title Omitted in Printing)

In the United States District Court for the Western District of Missouri, Western Division.

[Page 1 through Page 3, line 13]

TRANSCRIPT OF PROCEEDINGS.

On Friday, the 10th day of August, 1979, the above-entitled cause came on for pre-trial conference before the Honorable WILLIAM R. COLLINSON, Judge, at Kansas City, Missouri.

Whereupon, the following proceedings were had and entered of record:

THE COURT: We will need the appearances of counsel here. If counsel will stand up and give their names and their client to the reporter at this time. We will start with the plaintiffs.

MR. RISJORD: John Risjord and Danny Curtis, lead and liaison counsel for the plaintiffs, steering committee and counsel for the plaintiffs in Goodwin, Butler, Hale, Rodriquez and Walker against Firestone.

MR. STITES: Ronald J. Stites, Robert Walker is my client, a member of the plaintiffs' steering committee.

MR. SCHULMAN: Howard J. Schulman; with me today is Thomas Minkin, M-i-n-k-i-n (spelling), on behalf of the plaintiff Lantieri. I'm also a member of the steering committee for the plaintiffs.

MR. OWSLEY: Michael A. Owsley, O-w-s-l-e-y (spelling), on behlaf of Henderson.

MR. RODEN: Robert Roden on behalf of Gail McGee versus Goodyear Tire & Rubber Company and Thomas Clayton, also a member of the steering committee.

MR. MIMS: Johnny W. Mims, attorney for Joe B. Brown and also a member of the plaintiff's steering committee.

MR. EASLEY: Cliff Easley, Bruce, Mississippi, attorney for Butler, Goodwin case and also a member of the steering committee.

THE COURT: Any other plaintiffs' counsel present? Defendants' counsel.

MR. SHAPIRO: Alvin Shapiro, Paul Donnelly, Lawrence Brown and Neal Gerstandt of the Stinson, Mag firm for Goodyear plus Jim Benjamin, David Oliver and John Cozad of the Field, Gentry firm also here.

MR. FREIVOGEL: William Freivogel for the Firestone Tire & Rubber Company and John Carothers for the Firestone Tire & Rubber Company, and Fran Prell. And liaison counsel, William Sanders and James Warden.

* * *

[Page 68, line 5 through page 77, line 24].

THE COURT: I am not requiring any non-manufacturing defendants to file any such suggestions but if they want to, they can. Let's leave it that way.

Now, gentlemen, I have the motion to disqualify Mr. Risjord. There have been a number of papers filed in connection with it.

What I want to do right now is to get a stipulation of uncontroverted facts—some of the facts that I have learned have simply been in the suggestions and haven't appeared in depositions or what I would call hard evidence. But I think they are uncontroverted. But let's get the uncontroverted facts spread on the record at this time. And it will be much simpler for me to order the parties to meet and stipulate to uncontroverted facts, but I think it probably would take too long. I think we can do it here.

The first uncontroverted fact, as I understand, is that—maybe it isn't uncontroverted—that the Home Insurance Company is the liability carrier on Firestone, on the lawsuits against Firestone pending in this court—well, on a deductible policy but all liability over $50,000; is that correct, Mr. Freivogel?

MR. FREIVOGEL: Your Honor, it is correct. I think the deductible, as your Honor calls it, varied from year to year, and there are a couple of cases involving accidents which occurred outside the coverage of that policy. There are more recent cases of occurrences in 1977, which are not under the Home policy but the bulk of the cases are under the Home policy.

THE COURT: How many cases in which you individually represent the plaintiff, Mr. Risjord, have named Firestone as a defendant?

MR. RISJORD: Firestone is named as a defendant in all but one of my cases, that is, their names are Rodriquez, Butler, Goodwin and Hale.

THE COURT: In four cases, they are named defendant?

MR. RISJORD: That is correct.

THE COURT: I presume from your statement that Home does have the liability coverage in some or all of those cases?

MR. FREIVOGEL: With one or two exceptions.

THE COURT: Those four he just named.

MR. FREIVOGEL: Would you repeat that list?

MR. RISJORD: Rodriquez, Butler, Goodwin and Hale.

MR. FREIVOGEL: I believe three of them, your Honor. I believe three of them but it may be two.

Your Honor, I think the correct term is not a liability policy but an excess policy.

THE COURT: Excess liability policy. Now, at the present time, Mr. Risjord or his law firm is representing the Home Insurance Company in a—in a direct suit against Home on a fire insurance policy; is that correct?

MR. RISJORD: That's correct, your Honor. It's entitled Canova Enterprises, Incorporated, doing business as Mr. C's 103 Restaurant, which was located at 103rd and State Line Road, and it's against, I believe, six property insurers, the subject of the suit being a claim on policies of fire insurance one of which was issued by the Home Insurance Company being the fire insurance parent company, as I understand it, of the Home Group.

THE COURT: Now, can you give me the approximate dates of when the employment commenced in that case?

MR. RISJORD: Employment—the fire occurred Christmas Eve, 1973, and I was employed in January of 1974. The case is still pending.

THE COURT: Very well. Now, is it stipulated that in Martindale-Hubbell, your firm lists Home Insurance Company as one of its clients and I guess, as Mr. Sanders pointed out about six times, it is a first listed client?

MR. RISJORD: Well, there is no significance to that. We certainly stipulate we have and do list the Home Insurance Company and I stress that that's the fire insurance company and not the liability insurer.

MR. FREIVOGLE: Your Honor, that's a misstatement. The Home Insurance Company issued this policy and it's the same Home Insurance Company and that also goes for the Home Indemnity Company which Mr. Risjord alluded to in his deposition. We have filed with your Honor letterheads from both Home Insurance and Home Indemnity and each letter was signed by the same claims manager.

MR. RISJORD: We list them at least in, I believe, the current Martindale-Hubbell, they are the first of a number of representative clients listed.

THE COURT: Now, let me ask this: Has your firm now or has it ever been on retainer basis with that company?

MR. RISJORD: No, sir.

THE COURT: Is that what I would call the ordinary employment of the liability insurance business, that you are under no obligation to accept employment and under no obligation, any legal obligation to employ you in cases filed in Kansas City?

MR. RISJORD: That's correct, your Honor, in addition to which they have not ever, to my knowledge, employed me in any liability or casualty type case.

THE COURT: And they have other counsel in Kansas City?

MR. RISJORD: They do.

THE COURT: In those cases?

MR. RISJORD: Yes, they do.

MR. FREIVOGEL: Your Honor—

MR. RISJORD: All of whom represent some other party in this litigation, I think.

MR. FREIVOGEL: Your Honor, it's also our position it is not just Mr. Risjord but it's his firm.

THE COURT: I understand.

MR. FREIVOGEL: I think at some point that ought to be established that it is the firm's cases.

THE COURT: The question I had, the firm has never received any—

MR. RISJORD: Retainer, no.

THE COURT: —any retainer?

MR. RISJORD: No, sir.

THE COURT: And as I say, it is what we practicing lawyers consider a client but they are under no obligation to employ you, your firm, in any litigation in Kansas City and you are under no obligation to accept employment if you choose not to.

MR. RISJORD: That's correct.

THE COURT: It's that arrangement, all right.

Now, to me those are the material facts which I feel affect this motion for disqualification. There are a number of other speculative matters alleged in the motion which I regard as immaterial in this matter.

Now, this court has a rule, Rule 43, which contains a provision that the—we adopt the Code of Professional Responsibility and Code of Judicial Conduct that is adopted by the Supreme Court of this state, and the Supreme Court of this state has published—has published a Code of Professional Responsibility and Code of Judicial Conduct which at least in regard—I haven't gone through all of it, but is identical on these provisions that we are interested in with the A.B.A. Code of Professional Responsibility, and I'm referring specifically to Canon 5, I believe it's 5, the disciplinary rule under Canon 5 provides that "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or business interest. (B) A lawyer shall not accept employment in contemplated or pending litigation—" this is the witness, this is the witness provision.

Now, those rules have a provision that if the client—here, it's DR 5-105(B)—(C), 105(C). "In the situation as covered by DR 5-105(A)—" that's the first one I read—"and (B), a lawyer may represent multiple clients if it is

obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

There are increasing number of decisions on this question. I feel that—and then, of course, there are the other provisions on the appearance of impropriety.

I feel that under 5-105(A), that there is an appearance of impropriety in Mr. Risjord representing the Home Insurance Company as a defendant, a client of his, present representation and representing plaintiffs suing that company, not suing that company but suing in effect that company would be liable—could be liable for a great deal of money in those lawsuits. I feel there is a very, very clear statement here that he may do so if he makes a full disclosure to the clients and they agree. I feel that if that can not be done that he will have to withdraw as counsel in litigation one place or the other.

This is—there is no claim, as I understood it, I should have included this in my stipulation, that he has ever represented Home Insurance Company in any subject matter related to litigation; that's correct, is it?

MR. FREIVOGEL: We have no knowledge that that is true.

MR. RISJORD: And I will state to the court that it never has been true. I never have represented the Home Insurance or the Firestone Tire & Rubber Company as their insured by the Home.

MR. FREIVOGEL: Again I refer to the word "I". I think the whole firm is relevant.

MR. RISJORD: The whole firm has not, excuse me, please correct.

THE COURT: So I think that I'm going to enter—I'll enter a written order on this matter along the lines I have just stated as to my conclusion as to the law, after reading a number of cases, after reading the Code of Professional Responsibility, that there will be a conditional granting of this motion for disqualification with the provision that Mr. Risjord may avoid that disqualification by the alternative methods I suggested, either withdrawing from the case in which he represents Home, completely withdrawing from that case here in Kansas City, or by the written consent of his clients and the Home in these damage suits. I'm just talking about the lawsuits that he filed in this court or the lawsuits he filed that are before this court, and the written consent of Home Insurance Company representing.

Now, I expect it will take a little time to comply with that order, let's say twenty days' additional time. There are several cases that hold that the order of disqualifying a lawyer is an appealable order. I found no cases saying the order which I think I am in fact making refusing a disqualification or the conditional disqualification is an appealable order, but I will be glad to certify it if the defendant Firestone wants it certified as an interlocutory appeal.

MR. FREIVOGEL: Your Honor, it was our intention if your Honor was going to deny our motion to appeal immediately, although I'm in agreement with your reading the cases that it's probably appealable with right of a notice of appeal filed within thirty days of the order.

But in light of the conditional nature of it, it creates kind of an uncertain—

THE COURT: Well, it won't be a final order, I will put in the order this is not a final order until Mr. Risjord has notified the Court what he chooses to do. He could choose

to just do nothing and appeal the order himself, he might choose to do that.

Let's say three weeks from today, twenty-one days from today, Mr. Risjord respond to the Court that he's either done this or taken the steps to do what I've suggested or he feels the Court's order is wrong and he intends to appeal immediately, twenty-one days. That would be plenty of time?

MR. RISJORD: Yes, your Honor, it is.

THE COURT: And I would suggest that when you take your appeal, you also get an order of interlocutory appeal.

MR. FREIVOGEL: Thank you, that's very kind of you.

* * *

[Page 102]

REPORTER'S CERTIFICATE.

I, CAROL O'NEAL, Registered Professional Reporter, hereby certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court for the Western District of Missouri; that the foregoing pages numbered 1 to 101a, inclusive, contain a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates stated therein, and that said transcript is a true transcription of my shorthand notes taken therein.

/s/ Carol O'Neal
Official Court Reporter

Second Pretrial Order.

In the United States District Court for the Western District of Missouri, Western Division.

In re: Multi-Piece Rim Products Liability Litigation. M.D.L. Docket No. 362.

Filed: Aug. 16, 1979.

SECOND PRETRIAL ORDER

On August 10, 1979, this Court held the second pretrial conference in this multidistrict proceeding. The several matters discussed during that conference will be discussed below.

I. Firestone's Motion to Disqualify Risjord

On May 24, 1979, defendant Firestone filed a motion to disqualify plaintiffs' lead counsel, John C. Risjord. Firestone advances two major arguments in support of its motion. First, Firestone argues that Mr. Risjord has a conflict of interests that bars his further participation in this case. At the pretrial conference that was held on August 10, 1979, the following facts were stipulated by Mr. Risjord and Firestone:

1) For the past several years, and until the present time, Mr. Risjord's law firm has included Home Insurance Company in its list of clients published in the Martindale-Hubbell Law Directory;

2) During the past several years Mr. Risjord's law firm has represented Home Insurance Company in litigation that was not related to this pending case;

3) Neither Mr. Risjord nor his law firm has ever represented Home Insurance Company in litigation that is related to this pending action;

4) Home Insurance Company does not pay a retainer fee to Mr. Risjord or to his law firm, but does

employ his law firm from time to time on a case-by-case basis;

5) Mr. Risjord's firm was employed in January, 1974, to represent Home Insurance Company in a suit on a fire insurance policy, which suit is presently pending in the Circuit Court of Jackson County, Missouri;

6) In at least two of the cases consolidated into this multidistrict proceeding, Mr. Risjord represents plaintiffs who have named Firestone as as defendant in their case;

7) Home Insurance Company is the liability insurance carrier who insures Firestone against excess liability in the two cases in which Mr. Risjord's clients have sued Firestone.

On November 3, 1978, this Court adopted Local Rule 43, which adopts the Code of Professional Responsibility of the Missouri Supreme Court. Disciplinary Rule 5-105 of that Code of Professional Responsibility provides:

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(c).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the

interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

In *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978), the Third Circuit Court of Appeals interpreted an identical provision of the Code of Professional Responsibility of the District of New Jersey and applied that provision to a case that is indistinguishable from the facts of this case. That court stated:

> The rule [DR 5-105] does not define that nature or extent of the adverse effect contemplated on the attorney's exercise of independent judgment. However, DR 5-105(C) makes clear that situations entailing the likelihood of an adverse effect include circumstances in which such an effect may be minor permitting the performance of adequate services in spite of it. In those cases the multiple representation may take place if the attorney believes in good faith that he can adequately represent both clients and if the consent of the clients is obtained.
>
> We think, however, that it is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter. *See Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-1387 (2d Cir. 1976); *Grievance Committee of the Bar of Hartford County v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964); Advisory Committee on Professional Ethics of the Supreme Court of New Jersey, *Opinion* No. 282, 97 N.J.L.J.

> 362 (1974), and *Opinion* No. 301, 98 N.J.L.J. 209 (1975). For example, a possible effect on the quality of the attorney's services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter. *See Cinema 5, Ltd. v. Cinerama, Inc., supra* at 1387. A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney. The fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence, depending upon the facts and circumstances, at the time the decision was made to represent the client without having obtained his consent.

After consideration of the briefs submitted by Firestone and by Mr. Risjord, and after consideration of the facts to which they have stipulated, this Court, like the court in *IBM v. Levin, supra*, "think[s] . . . that it is likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the adversary posture toward that client in another legal matter." *IBM v. Levin, supra* at 280. Accordingly, Mr. Risjord will, hereinafter, be directed to either comply with the consent requirement of DR 5-105(C) or terminate his representation of either the plaintiffs in the cases in which Firestone is a defendant or his representation of Home Insurance Company.

The Court is, however, of the opinion that this ruling on the disqualification of Mr. Risjord because of a conflict of interests involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this ruling may materially advance the ultimate termination of this litigation. This Court

will, therefore, pursuant to 28 U.S.C. §1292 (1976), certify this ruling for immediate appeal.

In addition, Firestone also argues that Mr. Risjord should be disqualified from further participation in this case because of an alleged violation of Local Rule 24. The allegations made in this argument raise questions of fact that will require an evidentiary hearing. A violation of Local Rule 24 would permit the imposition of some sanctions against Mr. Risjord, but the sanction of disqualification from further representation in this case would not be justified. Thus, since the relief requested by Firestone will not be granted even if the allegations of a violation of Local Rule 24 are true, a hearing on the questions of fact that are raised by Firestone's allegations will be deferred until a later date.

II. Expert Witnesses

During the pretrial conference that was held on August 10, 1979, questions were raised concerning discovery against expert witnesses. After consideration of the issues raised, this Court does, hereby, direct 1) that unless the parties have stipulated that a certain person may be deposed as an expert, any party desiring to commence discovery against an expert must move for permission to conduct the desired discovery and 2) that unless a prospective deponent has been identified as an expert prior to his deposition being taken, a subsequent deposition will be permitted if that deponent is later identified as an expert.

III. Document Depositories

Defendants Firestone and Goodyear shall each establish a document depository in Kansas City, Missouri, which depositories shall contain all documents that have heretofore or which may hereafter be produced by that defendant. The

depositories shall be accessible to counsel for any party to this action during regular business hours for inspection and/or copying of the documents contained in the depository.

IV. Extension of Local Discovery

The date for the close of local discovery in these consolidated actions is, hereby, extended to October 5, 1979.

V. Requests for Production

All Rule 34, Fed. R. Civ. P., requests for production of documents and things concerning the merits of the common issues in this case shall be filed and served on or before August 27, 1979. Any party upon whom a request for production of documents and things concerning the mertis of the common issues in this case shall serve either written objections within thirty days after service of the request or a written response within sixty days after service of the request.

VI. Discovery Period

Any party who desires to file suggestions concerning the date before which and after which occurrences may not be discovered into shall file those suggestions, supported by affidavits, on or before August 27, 1979.

VII. Depositions

A party desiring to take the deposition of any person shall give notice to all counsel of record, in writing, at least thirty days prior to the proposed deposition, which, in addition to the requirements of Rule 30(b), Fed. R. Civ. P., shall include a list of both the common issues and documents about which the prospective deponent will be questioned and, if the deponent will be questioned concerning specific rims or occurrences, notice shall be given of the type(s) of rim and/or the type of occurrence (*egs*. explosion during

inflation, explosion while mounting wheel on vehicle, explosion after mounting). The transcript of each deposition shall be promptly made available to all parties and shall be corrected and signed by the witness within thirty days of presentation of the transcript to the witness. Upon completion of interrogation, the deposition shall be adjourned until forty days after the transcript of the deposition has been made available to the parties, on which date, unless previously excused, the witness will appear for such further interrogation, if any, as any party may desire. Within ten days following the receipt of the transcript of a deposition, any party desiring further interrogation of the witness may serve notice, as set forth above, upon the parties to this action that additional interrogation will commence on the date until which the deposition has been adjourned. In the absence of notice of further interrogation of a witness with the time provided therefor, no further interrogation of that witness by any party will be permitted, except upon further order of this Court.

VIII. Deposition Schedule

No depositions concerning the merits of the common issues in this case shall be scheduled on or before October 29, 1979. Counsel for the parties to this action are hereby directed to file, on or before October 1, 1979, a joint proposed schedule of the depositions that will be taken during the period commencing October 29, 1979 and ending January 25, 1980.

IX.

The pending motions discussed above and those argued during the pretrial conference will be ruled without further discussion. It is, thus,

1) ORDERED that defendant Firestone's motion, filed May 24, 1979, to strike or, in the alternative, to dismiss, be, and hereby is, denied; and it is

2) ORDERED that, in *Henderson v. Firestone, et al.*, 79-0165-CV-W-2, Cooper Tire's motion for summary judgment, filed December 8, 1978, and Ford's motion for summary judgment, filed May 23, 1979, be, and hereby are, denied without prejudice to defendants Ford and Cooper Tire renewing the motions after the close of discovery; and it is

3) ORDERED that, in *Smith v. Firestone, et al.*, 79-0301-CV-W-2, defendant National Alfalfa's motion for summary judgment and defendant Firestone's motion, filed May 3, 1979, to file a cross-claim, be, and hereby are, denied without prejudice to defendants renewing the motions after the close of discovery; and it is

4) ORDERED that, in *Mixon v. General Motors, et al.*, 79-0340-CV-W-2, defendant General Motor's motion for summary judgment, filed May 18, 1979, be, and hereby is, denied without prejudice to defendant renewing the motion after the close of discovery; and it is

5) ORDERED that, in *Henderson v. Firestone*, 79-0165-CV-W-2, defendant Firestone's motion, filed May 8, 1979, to file a third-party complaint and defendant Cooper's motion, filed May 21, 1979, to file a third-party complaint, be, and hereby are, denied without prejudice to defendants refiling those motions in the transferor courts after the completion of discovery; and it is

6) ORDERED that plaintiffs' motion, filed July 12, 1979, for a protective order be, and hereby is, denied; and it is

7) ORDERED that the portions of plaintiffs' motions to compel Firestone, Goodyear, and General Tire to provide

lists of specific documents be, and hereby is, denied; and it is

8) ORDERED that plaintiffs' motion, filed July 26, 1979, to compel defendant Firestone to make a more complete answer to interrogatory number 1 be, and hereby is, denied; and it is

9) ORDERED that plaintiffs' motion, filed July 26, 1979, to compel defendant Firestone to answer interrogatories number 9, 10, and 11 be, and hereby is, granted; and it is

10) ORDERED that the attorneys for defendants Firestone, Goodyear, and General Tire meet and confer with plaintiffs' lead counsel for the purpose of reaching informal agreement on the remainder of the motions to compel filed June 25, 1979, July 26, 1979, August 2, 1979, and August 3, 1979 by plaintiffs and General Tire; and it is

11) ORDERED that plaintiffs' motion to compel defendants Firestone, Goodyear, and General Tire to make discovery, filed respectively, July 26, 1979, August 2, 1979 and August 3, 1979, and General Tire's motion, filed June 25, 1979, to compel plaintiff in 79-0165-CV-W-2 to make discovery be, and hereby are, denied without prejudice to plaintiff and General Tire renewing those motions if any matters remain unresolved after the conferences ordered above; and it is

12) ORDERED that Cooper Tire's motion, filed June 18, 1979, to produce for safekeeping be, and hereby is, denied; and it is

13) ORDERED that, on or before August 31, 1979, Mr. Risjord certify to this Court, by way of affidavit, that he has either met the consent requirement of DR 5-105 or terminated his representation of either Home Insurance

Company or the plaintiffs in any suit against Firestone; and it is

14) ORDERED that this Court's ruling on the question of Mr. Risjord's disqualifications because of a conflict of interests be, and hereby is, certified for immediate appeal pursuant to 28 U.S. C. §1292 (1976).

/s/ Wm. R. Collinson
District Judge

Dated: August 16, 1979.

Report.

(Title omitted in printing)

In the United States District Court for the Western District of Missouri, Western Division.

Filed: Aug. 28, 1979.

PLAINTIFFS' REPORT TO THE COURT
CONCERNING
PURPORTED CONFLICT OF JOHN C. RISJORD.

Attached hereto are the original executed Affidavits of Consent of the Home Insurance Company and rim litigants Butler, Goodwin, Hale and Rodriguez, and of John Risjord, their attorney.

By obtaining and submitting the foregoing consent of all involved clients, plaintiffs do not intend to concede the allegations of Firestone that there is any apparent conflict of interest nor do they agree with the conclusion of the Court that there is an apparent conflict of interest.

NIEWALD, RISJORD & WALDECK,
By /s/ JOHN C. RISJORD,
JOHN C. RISJORD
Lead and Liaison Counsel for Plaintiffs' Steering Committee.

State of Missouri County of Jackson—ss.

John C. Risjord of lawful age, being duly sworn upon oath, states that he is attorney of record in the following cases:

Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. Home Insurance Company, et al., No. 782397, in the Circuit Court of Jackson County, Missouri,

Butler vs. Firestone Tire & Rubber Company, et al., No. 78-0647-CV-W-2, M.D.L. No. 362, United States District Court for the Western District of Missouri, Western Division,

Goodwin vs. Firestone, et al., No. 78-0408-CV-W-2, M.D.L. No. 362, United States District Court for the Western District of Missouri, Western Division,

Hale vs. Firestone, No. 78-0266-CV-W-2, M.D.L. No. 362, United States District Court for the Western District of Missouri, Western Division, and

Rodriquez vs. Firestone Tire & Rubber Company, et al., No. 79-0086-CV-W-2, M.D.L. No. 362, United States District Court for the Western District of Missouri, Western Division.

Affiant has fully informed each client in the respective cases, being the Home Insurance Company, Joe Willie Butler, Edna Goodwin Perkins, individually and as next friend of her minor children, Larry and Linda Hale, and Rene Rodriguez, Luciano Rodriguez and Delphina Rodriguez, of the purported apparent conflict and the nature of the litigation involved therein, and has obtained their informed consent to continued representation.

/s/ John C. Risjord
John C. Risjord

Subscribed and sworn to before me this 28th day of August, 1979.

/s/ Kathryn D. Erdrich.
Notary Public

My commission expires:
July 22, 1982

(Certificate of service omitted in printing).

(Title omitted in printing)

In the United States District Court for the Western District of Missouri, Western Division.

AFFIDAVIT AND CONSENT OF HOME INSURANCE COMPANY OF NEW YORK.

State of Missouri, County of Jackson—ss.

Larry Wagner, of lawful age, being duly sworn upon oath states that he is an officer of the Home Insurance Company with the title of Assistant Secretary, that his duties include claims supervision of multiple lines of insurance, including property insurance, and specifically the case of Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. Home Insurance Company, et al., No. 782397, in the Circuit Court of Jackson County, Missouri at Kansas City, in which the firm of Niewald, Risjord & Waldeck is currently representing the Home Insurance Company, that he has been the regional claim manager of the Home Insurance Company for the past eight years and has personal knowledge of the relationship of the law firm of Niewald, Risjord & Waldeck and the Home Insurance Company and states that,

The Home Insurance Company and its affiliated companies do not nor have they ever to affiant's knowledge paid the law firm of Niewald, Risjord & Waldeck a retainer fee nor employed them on a retainer basis, that the law firm of Niewald, Risjord & Waldeck is not obligated to handle legal matters for the Home Insurance Company or any affiliated company, nor is the Home Insurance Company and its affiliated companies obligated in any way to employ the law firm of Niewald, Risjord & Waldeck, and

The Home Insurance Company and its affiliated companies employ a number of different law firms in the Kansas City area to handle claims litigation on an individual case-by-case basis, and the only case in which the law firm of

Niewald, Risjord & Waldeck and any member or associate thereof is currently employed by the Home Insurance Company or any of its affiliated companies is the case of Cannova Enterprises, Inc. vs. Home Insurance Company, et al., being a suit on fire insurance policies against several insurance companies and in which Home Insurance Company has 10% of the total coverage.

At no time to affiant's knowledge has the law firm of Niewald, Risjord & Waldeck ever received any information directly or indirectly from the Home Insurance Company regarding the Firestone Tire & Rubber Company nor been employed to represent directly or indirectly the Firestone Tire & Rubber Company or the Home Insurance Company with respect to any excess policy of the Home Insurance Company issued to the Firestone Tire & Rubber Company, and

The Home Insurance Company has been advised that the law firm of Niewald, Risjord & Waldeck represent plaintiffs in product liability cases against the Firestone Tire & Rubber Company which the attorneys state are:

Joseph W. Butler v. Firestone, et al., No. 78-0647-CV-W-2

Bobby C. Goodwin, et al. v. Firestone, et al., No. 78-0408-CV-W-1

Larry Hale, et al. v. Firestone, No. 78-0266-CV-W-2

Rodriguez v. Firestone, et al., No. H-77-288,

pending in the United States District Court for the Western District of Missouri and being so advised, the Home Insurance Company hereby consents to the continued representation of Niewald, Risjord & Waldeck of the Home In-

surance Company in the case of Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. Home Insurance Company, et al.

/s/ Larry Wagner Asst. Secretary
Larry Wagner, Assistant Secretary
for Home Insurance Company

On this 28 day of August, 1979, appeared before me, a Notary Public of Jackson County, Missouri, Larry Wagner, personally known to me to be an officer of the Home Insurance Company holding the office of Assistant Secretary who stated that the foregoing Affidavit and Consent is based upon his personal knowledge and that he subscribes and swears that the foregoing statement is true and correct.

/s/ Bertha Yeager
Notary Public

My commission expires:
BERTHA YEAGER M.C.E. 10/11/79.

(Title omitted in printing).

In the United States District Court for the Western District of Missouri, Western Division.

AFFIDAVIT AND CONSENT OF
JOE WILLIE BUTLER.

State of Mississippi, County of Leflore—ss.

Joe Willie Butler, of lawful age, being duly sworn upon oath, states that he is the party plaintiff in the suit entitled Joe Willie Butler vs. Firestone Tire & Rubber Company, et al., No. 78-0647-CV-W-2 in the United States District Court for the Western District of Missouri, Western Division, at Kansas City as part of M.D.L. No. 362 and that

He has been fully apprised of the fact that his Kansas City counsel, Niewald, Risjord & Waldeck currently represents the Home Insurance Company in a suit entitled Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. The Home Insurance Company, et al., in the Circuit Court of Jackson County, Missouri at Kansas City, No. 782397, a suit on policies of fire insurance arising from a fire loss on December 24, 1973 at 103rd street and State Line Road in Kansas City, Jackson County, Missouri; and that,

The law firm of Niewald, Risjord & Waldeck lists the Home Insurance Company as a representative client in the legal directory of Martindale-Hubbell and has for many years on a case-by-case basis handled litigation for the Home Insurance Company or its affiliated companies; and that,

The Home Insurance Company, or affiliated companies, do or may have an interest in the outcome of their case against Firestone in that Firestone has represented that an excess liability policy issued by the Home Insurance Company to Firestone may afford excess coverage for Firestone's liability to the undersigned plaintiff; and that,

With full knowledge of the relationship of the Niewald, Risjord & Waldeck law firm to the Home Insurance Company and its affiliates, the undersigned plaintiff consents and agrees to the continued representation by Niewald, Risjord & Waldeck of the undersigned plaintiff in his claim against the Firestone Tire & Rubber Company and other rim, wheel or tire manufacturers who are or may hereafter be named as parties.

His Mark

/s/ (X) Joe Willie Butler
Joe Willie Butler

On this 21 day of August, 1979, appeared before me, a Notary Public of Leflore County, Mississippi, Joe Willie Butler, personally known to me to be the plaintiff in the aforesaid lawsuit who has acknowledged that he understands the foregoing Affidavit and Consent, has conferred with counsel and has subscribed his name to the foregoing Affidavit and Consent as his own free act and deed.

/s/ (signature illegible)
Notary Public
Justice Court Judge
Dist. 1.
Leflore Co.

My commission expires:
12/30/1979

CONSENT AND APPROVAL OF COUNSEL

Yancy & Easley as referring counsel representing Joe Willie Butler acknowledge that they have fully explained the foregoing Affidavit and Consent to the client, which they approve and affirm.

Yancy & Easley,
By /s/ Cliff R. Easley, Jr.
Cliff R. Easley, Jr.
Attorneys for Joe Willie Butler.

(Title omitted in printing).

In The United States District Court for the Western District of Missouri, Western Division.

AFFIDAVIT AND CONSENT OF BOBBY CRAIG GOODWIN, CAROLYN MARIE GOODWIN, MELISSA DARLENE GOODWIN AND KATHY DIANE GOODWIN, MINORS, BY AND THROUGH THEIR NATURAL MOTHER AND NEXT FRIEND, EDNA GOODWIN PERKINS, AND EDNA GOODWIN PERKINS, INDIVIDUALLY.

State of Mississippi, County of Calhoun—ss.

Edna Goodwin Perkins, of lawful age, being duly sworn upon oath, states that she is the natural mother and next friend of Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin and Kathy Diane Goodwin, Minors, and that she and her aforementioned children are parties plaintiff in the suit entitled Bobby Craig Goodwin, et al. v. Firestone Tire & Rubber Company, et al., No. 78-0408-CV-W-2 in the United States District Court for the Western District of Missouri, Western Division, at Kansas City as part of M.D.L. No. 362 and that,

She has been fully apprised of the fact that her Kansas City counsel, Niewald, Risjord & Waldeck currently represent the Home Insurance Company in a suit entitled Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. The Home Insurance Company, et al., in the Circuit Court of Jackson County, Missouri at Kansas City, No. 782397, a suit on policies of fire insurance arising from a fire loss on December 24, 1973 at 103rd Street and State Line Road in Kansas City, Jackson County, Missouri; and that,

The law firm of Niewald, Risjord & Waldeck lists the Home Insurance Company as a representative client in the legal directory of Martindale-Hubbell and has for many

years on a case-by-case basis handled litigation for the Home Insurance Company or its affiliated companies; and that;

The Home Insurance Company, or affiliated companies, do or may have an interest in the outcome of their case against Firestone in that Firestone has represented that an excess liability policy issued by the Home Insurance Company to Firestone may afford excess coverage for Firestone's liability to the undersigned plaintiff; and that,

With full knowledge of the relationship of the Niewald, Risjord & Waldeck law firm to the Home Insurance Company and its affiliates, the undersigned plaintiff consents and agrees to the continued representation by Niewald, Risjord & Waldeck of the undersigned plaintiff in her claims against the Firestone Tire & Rubber Company and other rim, wheel or tire manufacturers who are or may hereafter be named as parties.

/s/ Edna Goodwin Perkins
Edna Goodwin Perkins

On this 18 day of August, 1979, appeared before me, a Notary Public of Calhoun County, Mississippi, Edna Goodwin Perkins, natural mother and next friend of Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin and Kathy Diane Goodwin, minors, on behalf of the aforementioned children and herself, personally known to me to be the plaintiffs in the aforesaid lawsuit who has acknowledged that she has read and understands the foregoing Affidavit and Consent, has conferred with counsel and has subscribed her name to the foregoing Affidavit and Consent as her own free act and deed.

/s/ Hazel Burnett
Notary Public

My commission expires:
Jan 22, 1980

CONSENT AND APPROVAL OF COUNSEL.

Yancy & Easley as referring counsel representing Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin and Kathy Diane Goodwin, Minors, by and through their natural mother and next friend, Edna Goodwin Perkins, and Edna Goodwin Perkins, individually, acknowledge that they have fully explained the foregoing Affidavit and Consent to the client, which they approve and affirm.

Yancy & Easley,
By /s/ Cliff R. Easley, Jr.,
Cliff R. Easley Jr.,

Attorneys for Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin and Kathy Diane Goodwin, Minors, by and through their Natural Mother and Next Friend, Edna Goodwin Perkins.

(Title omitted in printing).

In the United States District Court for the Western District of Missouri, Western Division.

AFFIDAVIT AND CONSENT OF LARRY HALE AND LINDA HALE,

State of Missouri, County of Vernon—ss.

Larry Hale and Linda Hale, of lawful age, being duly sworn upon oath, state that they are parties plaintiff in the suit entitled Larry Hale and Linda Hale v. Firestone Tire & Rubber Company, No. 78-0266-CV-W-2, in the United States District Court for the Western District of Missouri, Western Division, at Kansas City as part of M.D.L. No. 362, and that

They have been fully apprised of the fact that their counsel, Niewald, Risjord & Waldeck, currently represent the Home Insurance Company in a suit entitled Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. The Home Insurance Company, et al., in the Circuit Court of Jackson County, Missouri at Kansas City, No. 782397, a suit on policies of fire insurance arising from a fire loss on December 24, 1973 at 103rd Street and State Line Road in Kansas City, Jackson County, Missouri; and that,

The law firm of Niewald, Risjord & Waldeck list the Home Insurance Company as a representative client in the legal directory of Martindale-Hubbell and has for many years on a case-by-case basis handled litigation for the Home Insurance Company or its affiliated companies; and that,

The Home Insurance Company, or affiliated companies, do or may have an interest in the outcome of their case against Firestone in that Firestone has represented that an excess liability policy issued by the Home Insurance Company to Firestone may afford excess coverage for Firestone's liability to the undersigned plaintiffs; and that,

With full knowledge of the relationship of the Niewald, Risjord & Waldeck law firm to the Home Insurance Company and its affiliates, the undersigned plaintiffs consent and agree to the continued representation by Niewald, Risjord & Waldeck of the undersigned plaintiffs in their claims against the Firestone Tire & Rubber Company and other rim, wheel or tire manufacturers who are or may hereafter be named as parties.

/s/ Larry J. Hale
Larry Hale

/s/ Linda K. Hale
Linda Hale

On this 15 day of August, 1979, appeared before me, a Notary Public of Vernon County, Missouri, Larry Hale and Linda Hale, personally known to me to be the plaintiffs in the aforesaid lawsuit who have acknowledged that they have read and understand the foregoing Affidavit and Consent and have subscribed their names to the foregoing Affidavit and Consent as their own free act and deed.

/s/ Jacquelyn J. Hardy
Notary Public

My commission expires:
Nov. 23, 1980

(Title omitted in printing)

In the United States District Court for the Western District of Missouri, Western Division.

AFFIDAVIT AND CONSENT OF RENE RODRIGUEZ, LUCIANO RODRIGUEZ AND DELPHINA RODRIGUEZ,

State of Texas, County of Victoria—ss.

Rene Rodriguez, Luciano Rodriguez and Delphina Rodriguez, of lawful age, being duly sworn upon oath, state that they are parties plaintiff in the suit entitled Rene Rodriguez, Luciano Rodriguez and Delphina Rodriguez vs. Firestone Tire & Rubber Company, et al., No. C.A. H-77-288 Consolidated with C.A. H-77-1789 in the United States District Court for the Southern District of Texas, which is currently transferred to the United States District Court for the Western District of Missouri, Western Division, at Kansas City as part of M.D.L. No. 362 and that,

They have been fully apprised of the fact that their Kansas City counsel, Niewald, Risjord & Waldeck currently represent the Home Insurance Company in a suit entitled Cannova Enterprises, Inc., d/b/a Mr. C's 103 vs. The Home Insurance Company, et al, in the Circuit Court of Jackson County, Missouri at Kansas City, No. 782397, a suit on policies of fire insurance arising from a fire loss on December 24, 1973 at 103rd Street and State Line Road in Kansas City, Jackson County, Missouri; and that,

The law firm of Niewald, Risjord & Waldeck list the Home Insurance Company as a representative client in the legal directory of Martindale-Hubbell and has for many years on a case-by-case basis handled litigation for the Home Insurance Company or its affiliated companies; and that,

The Home Insurance Company, or affiliated companies, do or may have an interest in the outcome of their case

against Firestone in that Firestone has represented that an excess liability policy issued by the Home Insurance Company to Firestone may afford excess coverage for Firestone's liability to the undersigned plaintiffs; and that,

With full knowledge of the relationship of the Niewald, Risjord & Waldeck law firm to the Home Insurance Company and its affiliates, the undersigned plaintiffs consent and agree to the continued representation by Niewald, Risjord & Waldeck of the undersigned plaintiffs in their claims against the Firestone Tire & Rubber Company and other rim, wheel or tire manufacturers who are or may hereafter be named as parties.

/s/ Rene Rodriguez
Rene Rodriguez

/s/ Luciano Rodriguez
Luciano Rodriguez

/s/ Delphina Rodriguez
Delphina Rodriguez

On this 17th day of August, 1979, appeared before me, a Notary Public of Victoria County, Texas, Rene Rodriguez, Luciano Rodriguez and Delphina Rodriguez, personally known to me to be the plaintiffs in the aforesaid lawsuit who have acknowledge that they have read and understand the foregoing Affidavit and Consent, have conferred with counsel and have subscribed their names to the foregoing Affidavit and Consent as their own free act and deed.

/s/ Donna Borth
Notary Public

My commission expires:
7-24-81

CONSENT AND APPROVAL OF COUNSEL.

Kilgore, Cole & McManus as referring counsel representing Rene Rodriguez, Luciano Rodriguez and Delphina Rodriguez acknowledge that they have fully explained the foregoing Affidavit and Consent to the clients, which they approve and affirm.

KILGORE, COLE & MCMANUS,
By /s/ Steve Q. McManus,
Steve Q. McManus,
Attorneys for Rene Rodriguez,
Luciano Rodriguez and Delphina Rodriguez.

Notice of Appeal.

(Title omitted in printing).

In the United States District Court for the Western District of Missouri, Western Division.

Filed: Sept. 11, 1979.

NOTICE OF APPEAL

Notice is hereby given that The Firestone Tire & Rubber Company (hereinafter "Firestone"), a defendant and an aggrieved party in this Multi-Piece Rim Products Liability Litigation, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the following:

1. From so much of the Second Pretrial Order entered in this cause of August 16, 1979 (hereinafter "Second Pretrial Order") as constitutes a ruling on the Motion of defendant Firestone entitled "Motion of The Firestone Tire & Rubber Company to Disqualify John C. Risjord" (hereinafter "Risjord"), filed in this Court on May 24, 1979, including the following portions of the said Second Pretrial Order:

a. Part I thereof entitled "Firestone's Motion to disqualify Risjord" and,

b. The order contained therein reading as follows:

> "The pending motions discussed above and those argued during the pretrial conference will be ruled without further discussion. It is, thus,
>
> * * *
>
> "13) ORDERED that, on or before August 31, 1979, Mr. Risjord certify to this Court, by way of affidavit, that he has either met the consent requirement of DR5-105 or terminated his representation of either Home Insurance Company

or the plaintiffs in any suit against Firestone . . .";

and,

2. From the above-described portions of the said Second Pretrial Order as affected by Plaintiffs' Report to the Court Concerning Purported Conflict of John C. Risjord with Affidavits and Consents of the Home Insurance Company and of rim litigants Joe Willie Butler, Edna Goodwin Perkins, Linda and Larry Hale, and Rene, Luciano and Delphina Rodriguez, and of John C. Risjord, their attorney, attached thereto, filed in this Court on August 28, 1979.

DATED: September 6, 1979.

WILLIAM FREIVOGEL
ROSS, HARDIES, O'KEEFE, BABCOCK AND PARSONS,
and

/s/ WILLIAM H. SANDERS,
William H. Sanders,
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI,
Attorneys for Defendant
The Firestone Tire & Rubber Company.

(Certificate of service omitted in printing).

Motion.

(Title omitted in printing).

In the United States District Court of the Western District of Missouri, Western Division.

MOTION AND REQUEST FOR ORAL ARGUMENT OF THE FIRESTONE TIRE & RUBBER COMPANY REGARDING CONTEMPT OF JOHN C. RISJORD.

Defendant The Firestone Tire & Rubber Company (''Firestone''), by its attorneys, hereby moves the Court for entry of an order that John C. Risjord be adjudged guilty of contempt of this Court.

This Motion is made upon the grounds that said John C. Risjord violated this Court's Order of August 16, 1979 (order paragraph 13 of the Second Pretrial Order) by failing to certify to this Court that he has satisified either of the conditions therein specified and in failing to satisfy either of said conditions, all as more particularly set forth in the annexed Brief and Suggestions.

This Motion is based upon the annexed Second Pretrial Order in these proceedings made and entered under date of August 16, 1979, the Transcript of Proceedings of August 10, 1979 previously filed herein, the document and attachments filed by John C. Risjord under date of August 28, 1979 entitled ''Plaintiffs' Report to the Court Concerning Purported Conflict of John C. Risjord,'' and the annexed Brief and Suggestions.

Pursuant to Rule 10(a) of this Court, Firestone hereby requests oral argument of this Motion.

Dated: October 5th, 1979.

William Freivogel,
Ross, Hardies, O'Keefe, Babcock
and Parsons,
and
/s/ William H. Sanders,
William H. Sanders,
Blackwell Sanders Matheny Weary
& Lombardi,
Attorneys for Defendant
The Firestone Tire & Rubber Company.

(Certificate of service omitted in printing)

Supplementary Brief.

(Title omitted in printing.)

In the United States District Court of the Western District of Missouri, Western Division.

SUPPLEMENTARY BRIEF AND RESPONSE OF JOHN C. RISJORD IN OPPOSITION TO THE MOTION AND REQUEST FOR ORAL ARGUMENT OF THE FIRESTONE TIRE & RUBBER COMPANY REGARDING CONTEMPT OF JOHN C. RISJORD AND THE MOTION OF FIRESTONE FOR DISQUALIFICATION.

The Home Insurance Company has discharged John C. Risjord and Niewald, Risjord & Waldeck from the case of Cannova v. The Home Insurance Company, et al., Docket Number 782,397, in the Circuit Court of Jackson County, Missouri, which was the only case in which Risjord or his law firm represented the Home Insurance Company or any member company of the Home Insurance Group. A true copy of the letter of discharge, stating the reason therefor, and an attested copy of the Withdrawal of Appearance duly filed with the Clerk of the Circuit Court of Jackson County, Missouri are attached hereto.

Niewald, Risjord & Waldeck,
By /s/ John C. Risjord,
John C. Risjord,
Lead and Liaison Counsel for Plaintiffs.

AFFIDAVIT,

State of Missouri, County of Jackson—ss.

John C. Risjord of lawful age, being duly sworn upon oath, states that the attached letter is a true copy of the notice of discharge by the Home Insurance Company dated and received November 6, 1979, and a true copy of the Withdrawal on behalf of affiant and his firm from the Cannova case duly filed with the Clerk of the Circuit Court of Jackson County, Missouri.

/s/ John C. Risjord
John C. Risjord

Subscribed and sworn to before me this 12th day of November,

/s/ Margaret P. Nelson
Notary Public

In the Circuit Court of Jackson County, Missouri.

Cannova Enterprises, Inc., d/b/a Mr. C's 103, et al., Plaintiffs, vs. Great American Insurance Company, et al., Defendants. No. 782, 397 Civil E.

Filed: Nov 7, 1979.

WITHDRAWAL OF APPEARANCE

COME NOW John C. Risjord and Niewald, Risjord & Waldeck and hereby withdraw as attorneys of record for the Home Insurance Company. A copy of the request of the Home Insurance Company is attached hereto as Exhibit A.

NIEWALD, RISJORD & WALDECK,
By /s/ JOHN C. RISJORD,
John C. Risjord

Attorneys for Aetna Casualty & Surety Co., Great American Insurance Co., St. Paul Fire & Marine Insurance Co., Northwestern National Insurance Co., and Continental Insurance Company.

(Certificate of service omitted in printing)

Approved this 7th day of November, 1979.
By /s/ Lewis W. Clymer

A TRUE COPY - ATTEST
CIRCUIT COURT OF JACKSON COUNTY, MO.
COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF JUDICIAL RECORDS

By /s/ (signature illegible)

Exhibit A.

THE HOME INSURANCE COMPANY

911 Main St., P.O. Box 13166, Kansas City, Missouri 64199

Telephone 816 221-3455

November 6, 1979

Mr. John C. Risjord
Niewald, Risjord & Waldeck
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105

RE: Cannova Enterprises, Inc. d/b/a Mr. C's 103
vs. Home Insurance Company, et al
Case No. 782397

Dear Mr. Risjord:

Your file will reflect the only case you or your firm is presently handling for the Home Insurance Company of New York and its affiliated companies is the case of Cannova Enterprises, Inc. d/b/a Mr. C's 103 vs. Home Insurance Company, et al, Case No. 782397 in the Circuit Court of Jackson County, Missouri at Kansas City. That case is one in which you were retained by the General Adjustment Bureau. The Home did not have any choice but to accept your representation of the Home's minor interest in that dispute.

The case was the subject of the Affidavit and consent of Home Insurance Company of New York filed in the case styled in Re: Multi-Piece Rim Products Liability Litigation, M.D.L. No. 362 currently pending in the United States District Court for the Western District of Missouri, Western Division. The Affidavit and Consent was executed pursuant

to an Order entered by the Honorable William R. Collinson, District Judge.

The Home Insurance Company of New York has now been informed that the Affidavit and Consent as filed has given rise to considerable expenditure of Court time and the time of the litigants in the M.D.L. No. 362 as well as causing the filing of a separate suit in the United States District Court for the Western District of Missouri which will generate the expenditure of considerable time and money in the defense of the same over a very inconsequential matter to wit: your continued representation of the Home Insurance Company in the Cannova case.

In view of the time and expense involved to this time and the future time and expense that will necessarily be involved, I have been asked to instruct you and your firm to immediately withdraw your appearance as attorneys for the Home Insurance Company in the Cannova case. Arrangements have been made for other counsel to enter their appearance.

This request does not mean to infer in any way that your representation of this company has in any way placed you in a position to obtain from the Home any information it may have received as insurance carrier for Firestone. The fact is now, and has always been, that you have not had access to nor will you ever have access to any information which The Firestone Tire & Rubber Company has made available or will make available to the Home Insurance Company regarding its products. The fact is that litigation is expensive and this inconsequential relationship between you, your firm and the Home Insurance Company does not merit this kind of expense.

Looking forward to receiving your motion for withdrawal as attorneys by return mail, I remain

Very truly yours,
/s/ LARRY G. WAGNER,
Larry G. Wagner
ASSISTANT SECRETARY, CLAIMS

LGW:kb

(Certificate of service omitted in printing).

Withdrawal of Motion.

(Title omitted in printing).

In the United States District Court for the Western District, of Missouri, Western Division.

Filed: Nov. 30, 1979.

FIRESTONE'S WITHDRAWAL OF ITS MOTION FOR ORDER HOLDING JOHN C. RISJORD IN CONTEMPT.

The Firestone Tire & Rubber Company hereby withdraws its Motion for Order Holding John C. Risjord in contempt for the reasons stated in the accompanying Suggestions.

William Freivogel,
Ross, Hardies, O'Keefe
Babcock & Parsons,

William H. Sanders,
Blackwell, Sanders, Matheny
Weary & Lombardi,

By /s/ William H. Sanders
William H. Sanders

(Title omitted in printing).

In the United States District Court for the Western District of Missouri, Western Division.

SUGGESTIONS IN SUPPORT OF FIRESTONE'S WITHDRAWAL OF ITS MOTION FOR ORDER HOLDING JOHN C. RISJORD IN CONTEMPT.

The dismissal of John C. Risjord ("Risjord") by The Home Insurance Company ("Home") in *Cannova v. Great American* on November 6, 1979, technically does not relieve Risjord of the consequences of his failure to comply with this Court's order during the period he was not in compliance. However, in light of the fact that Risjord is now in the status of not representing Home, and in light of the fact that a contempt order would serve no useful purpose and would not now under the circumstances be entered anyway, The Firestone Tire & Rubber Company ("Firestone") is withdrawing its Motion.

Risjord's technical compliance with *this* Court's order does not, of course, satisfy Firestone's objection to the order or resolve the matter now pending in The United States Court of Appeals for the Eighth Circuit.

It should be further noted that Home's letter discharging Risjord does nothing to dispel the notion that Home is actively seeking to keep Risjord in the rim cases because of his unique intentional tort theories. Home could have written a very simple, straightforward letter; instead, the letter reads like a brief in favor of Risjord's continuing in these cases.

This course of conduct is the subject of *Firestone v. Home*, 79-0961-CV-W-2, now pending in this Court.

William Freivogel,
Ross, Hardies, O'Keefe,
Babcock & Parsons,

-and-

/s/ William H. Sanders,
William H. Sanders,
Blackwell, Sanders, Matheny,
Weary & Lombardi,
Attorneys for Defendant
Firestone Tire & Rubber Company.

(Certificate of service omitted in printing).

Affidavit.

(Title omitted in printing).

In the United States District Court for the Western District of Missouri, Western Division.

State of Ohio, County of Summit—ss.

AFFIDAVIT OF JOHN B. CAROTHERS III.

John B. Carothers III, being duly sworn, states as follows:

1. He is an associate in the law firm of Ross, Hardies, O'Keefe, Babcock & Parsons, One IBM Plaza, Suite 3100, Chicago, Illinois 60611, telephone number 312-467-9300.

2. Among his duties is assisting in the coordination of litigation involving wheels and rims manufactured by Firestone Steel Products Company, a division of The Firestone Tire & Rubber Company (hereinafter "Firestone").

3. Among said duties have been dealings with the Home Insurance Company, an excess liability insurance carrier for Firestone, and Johnson & Higgins, Inc., Firestone's insurance broker.

4. The attached document designated Exhibit A is a true and correct copy of a letter received by Johnson & Higgins, Inc. from the Home Insurance Company.

5. Further affiant sayeth not.

/s/ John B. Carothers III
John B. Carothers III

SUBSCRIBED and SWORN to on
this 5th day of December, 1979.
/s/ Joyce L. Webb,
Notary Public
Joyce L. Webb, Notary Public
My Commission Expires Feb. 27, 1981

Exhibit A.

THE HOME INSURANCE COMPANY
Manchester, New Hampshire

Executive offices: 59 Maiden Lane, New York, N.Y. 10038

November 15, 1979

Johnson & Higgins, Inc.
95 Wall Street
New York, New York 100005

Attention: A. Stazzone
File: 311-E-738 002
Insured: Firestone Tire & Rubber Co.
Date of Accident: September 23, 1975
Plaintiff: L. Rodriguez

Gentlemen:

We are in receipt of an amended Complaint brought in the United States District Court for Southern District of Texas, Houston Division, on the above captioned claim.

A review of this Complaint reveals that the plaintiff is alleging that the insured deliberately withheld information regarding their products.

We refer you to the policy definition of "Occurrence" which states:

> "The term Occurrence wherever used herein shall mean an accident or happening or event or continuous or repeated exposure to conditions which unexpectedly and unintentionally result in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions emanating from one premises location shall be deemed one occurrence".

In light of the foregoing, The Home Insurance Company must reserve all its rights in connection with the damages sought by the plaintiff in this case.

Please convey our position to the insured and provide me with a copy of your covering letter.

Very truly yours,
/s/ Francis Lynch
Francis Lynch
Supervisor, Excess Claims
Claims Department

FL:cg

Opinion and Judgment.

United States Court of Appeals for the Eighth Circuit.

In re: Multi-Piece Rim Products Liability Litigation. Firestone Tire & Rubber Co., Appellant, v. John C. Risjord, Appellee. No. 79-1781.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 28, 1979.

Filed: January 7, 1980.

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges, sitting en banc.

LAY, Circuit Judge.

Personal injury claimants brought suit against the Firestone Rubber Co. and Firestone moved thereafter that claimant's counsel, John C. Risjord, and his law firm be disqualified from representing them because of an alleged conflict of interest with Firestone's insurer. The district court, the Hon. William R. Collinson presiding, ordered counsel Risjord to comply with the consent requirement of Disciplinary Rule 5-105 of the Code of Professional Responsibility of the Missouri Supreme Court or terminate his representation of either plaintiffs or the insurer.[1] Risjord thereafter complied with DR5-105(C) which required that Risjord receive consent from the insurance carriers or terminate his representation in the suit. The district court ruled that Risjord had complied with his order and that Risjord

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[1]DR5-105(C) provides:

> In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

should not be disqualified from the litigation. The district court further certified his ruling on the disqualification for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

Rather than obtain permission to appeal from this court, as required under section 1292(b), Firestone simply filed a notice of appeal. Risjord challenges the order as not being appealable since it is not a final order. The law in this circuit has been that an order denying a motion for disqualification of counsel is final under the collateral order doctrine recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 606-07 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979).

Recently, the Sixth Circuit overruled an earlier decision and held an order denying a motion for disqualification of counsel would no longer be appealable under the collateral order doctrine. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979). The Sixth Circuit stated:

> Motions to disqualify an opponent's counsel can easily be simply "disguised harrassment [sic]".
>
> . . . .
>
> A rule allowing interlocutory appeals here would provide litigants with yet another device by which to delay final determination on the merits, and would lead the court to divert its attention from the central issues in the case.

Id. at 295, (footnote omitted) (quoting in part *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027 (D.C. Cir. 1976)).

We have reconsidered *Weber* and *Dean Foods* and now agree with the position of the District of Columbia, Sixth and Ninth Circuits; it is the opinion of this court that *Weber*

and *Dean Foods* should be and hereby are overruled.[2] *See generally*, Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chicago L. Rev. 450 (1978).

In so holding we recognize there exists a fundamental distinction between a denial of a motion of disqualification of counsel and a grant of a motion for disqualification. In the latter case of disqualification we will still continue to apply the collateral order doctrine and recognize the order as appealable. We also concur with the Sixth Circuit's opinion, which allows for immediate review in the exceptional case where irreparable harm could occur by denial of an interlocutory appeal. The Sixth Circuit observed:

> We believe our position denying interlocutory appeal of orders refusing to disqualify counsel to be fully consonant with the Supreme Court's holding in *Cohen*. Although "collateral" to the main proceeding, an order denying a motion to disqualify does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment. In the exceptional case, where irreparable harm would indeed result, the movant may petition this court for a writ of mandamus under 28 U.S.C. §1651 (1970), the All Writs Act. This approach will afford the court the flexibility necessary to prevent serious injustice while advising litigants of the court's extreme reluctance to depart from the final judgment rule.

Melamed v. ITT Continental Baking Co., 592 F.2d at 296 (quoting *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027-28 (D.C. Cir. 1976)).

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[2]This opinion has been circulated to the court en banc, and all active judges concur.

In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean Foods* to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings.

IT IS SO ORDERED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

Judgment.

United States Court of Appeals for the Eighth Circuit.

In Re: Multi-Piece Rim Products Liability Litigation Firestone Tire & Rubber Company, Appellant, vs. John C. Risjord, Appellee. No. 79-1781.

September Term, 1979.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be considered on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties without oral argument.

On consideration whereof, it is now here ordered and adjudged by this Court, that appellee's motion to dismiss is denied.

And it is further ordered that the said District Court's denial of the motion to disqualify is affirmed.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court.

January 7, 1980

Cost taxed in favor of appellee:

Cost of printing 10 copies of brief:	$553.64
Total costs of appellee for recovery from appellant in the U.S. District Court:	$553.64

[Entered January 7, 1980]

Order entered in accordance with opinion:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, 8th Circuit.

Complaint.

In the United States District Court for the District of Kansas.

Edward Campbell, Plaintiff, v. The Goodyear Tire & Rubber Company, and F.M.C. Corporation, Defendants. Case No. 79-1314.

Filed Jun. 29, 1979.

COMPLAINT

COUNT I.

Comes now plaintiff and for Count I of his Complaint states as follows:

1. Plaintiff is an individual citizen of the State of Kansas, residing in Solomon, Dickinson County, Kansas; The Goodyear Tire & Rubber Company (Goodyear) is a corporation organized and existing pursuant to the laws of the State of Ohio with principal offices for the transaction of business in Akron, Summit County, Ohio; F.M.C. Corporation (FMC) is a Delaware corporation with principal offices for the transaction of business in a state other than Kansas; so that defendants are citizens of states other than Kansas and not citizens of Kansas and there is complete diversity of citizenship between the parties.

2. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00); exclusive of interest and cost, to-wit: Twenty-Seven Million Five Hundred Thousand Dollars ($27,500,000.00), and this Court has jurisdiction in the first instance pursuant to Section 1332(a) U.S.C.

3. At all times hereinafter alleged defendants were duly authorized to transact business in the State of Kansas and have offices and distribution centers for their businesses within the District of Kansas.

4. On or about July 7, 1977, an M-type multi-piece rim manufactured by defendant, The Goodyear Tire & Rubber Company, and sold and distributed by defendants Goodyear and FMC, exploded at Salina, Saline County, Kansas, while plaintiff was attempting to deflate it, causing castastrophic injuries to plaintiff and resulting in his total and permanent disability.

5. At the time of his injuries, plaintiff was eighteen (18) years old and had been employed by Royal Tire Company, Salina, Saline County, Kansas, for approximately one month. Plaintiff and a co-employee of the Royal Tire Company, under the supervision of another Royal Tire employee, repaired a tire and tube removed from the M-type rim and inflated the assembly in a safety cage, using a clamp-on air chuck attached to an air hose which was operated by remote control and an automatic shut-off device. Plaintiff and his co-employees removed the inflated assembly from the safety cage and the M-type rim explosively separated and struck plaintiff causing the following injuries, without limitation; total loss of vision in the left eye, severe limitation of vision in the right eye, loss of sense of taste, loss of sense of smell, skull fracture, comminuted facial fractures, brain damage, loss of memory, facial disfigurement, separation of both knees, both elbows, and both shoulders, all of which caused great pain, mental anguish, psychological and emotional derangement and suffering, and all of which are disabling and permanent in nature and which have required and will continue to require medical treatment and expenses, and which deprive plaintiff of his ability to support and maintain himself.

6. At the time of the manufacture, sales and distribution of the M-type multi-piece rim by defendants, said rim was defective in that it had a proclivity to blow apart and explode which was known by defendants when put to the use in-

tended and anticipated and defendants failed to warn of said defect and failed to recall, retrofit or otherwise remedy design defects and known hazards of such multi-piece rims.

7. At the time of plaintiff's injuries, the multi-piece rim was in substantially the same condition as when manufactured, sold and distributed by defendants and was being used by plaintiff as the product was reasonably intended to be used and as defendants anticipated its use and because of the aforesaid defect in the design and manufacture of the M-type multi-piece rim it exploded, totally and permanently injuring and disabling plaintiff as specified before.

8. At the time of the design, development, manufacture, distribution, licensing and sale of the subject multi-piece rim assembly and prior to plaintiff's injuries, defendant knew that the design, configuration, materials and construction of the multi-piece Goodyear rim components presented an extreme and unusual hazard to the motoring public and particularly to anyone attempting to mount an inflated multi-piece assembly on a vehicle. In spite of the existence of known hazards and numerous serious and fatal injuries over a period of some fifty-five years, defendant The GoodYear Tire & Rubber Company negligently, willfully or intentionally:

(a) failed and refused to redesign the multi-piece rims and failed to thereby preclude a mixture of parts;

(b) failed to recall such defective rims from the market;

(c) failed to develop, test and distribute safety devices to prevent explosive separation of multi-piece rims;

(d) failed to warn adequately of the hazards involved in every step of the assembly and usage of such rims;

(e) failed to develop any meaningful engineering criteria for determination of proper assembly and the extent of the hazard involved in improper assembly;

(f) failed to notify users of such rims of the risk involved in standing in close proximity to a vehicular mounting of inflated assemblies;

(g) failed to replace the multi-piece assembly with safe rims of single-piece design or of safer multi-piece designs;

(h) failed to advise the United States Department of Transportation and state agencies of the existence and extreme hazards presented by the defects inherent in multi-piece rims;

(i) failed to notify and fully inform the United States Department of Transportation and state agencies of the existence of the single-piece rim or of safer multi-piece rims as a solution to the problem;

(j) deliberately withheld information and gave misinformation with respect to the nature, extent, cause and serious consequences of the defects in such rims and of the feasibility of recall or retrofit, before, during and after the attempted investigation by the Office of Defects Investigation, United States Department of Transportation, and state agencies, of Goodyear multi-piece rims, and after being requested or required by the United States Department of Transportation and state agencies to develop and distribute foolproof or safe rims and to distribute adequate, clear and specific warnings with respect to such defects and hazards inherent in multi-piece rims failed to do so in a thorough, timely and specific manner;

(k) failed to discontinue production and failed to adequately test its multi-piece rims when defendant knew better, safer products were available and knew that adequate and appropriate tests would establish

defects which permit the bursting of the parts of the said rims with resulting injuries or death;

(l) deliberately misrepresented to the Department of Transportation, state agencies, and to the general public the fact that the multi-piece rim was a defective and dangerous design concept remedial only by a total manufacturer's notification campaign, commonly known as recall or retrofit.

9. Defendant FMC knew of the inherent hazards in multi-piece rim assemblies, including the M-type, and placed a decal on the cab of its product, one Link-Belt Mobile Crane, Model 138, which contained the following statement:

"DANGER STAND CLEAR WHEN INFLATING OR DEFLATING TIRES. IF RIM SIDE OR LOCK RING BLOWS OUT SEVERE INJURY MAY RESULT."

The foregoing statement was inadequate and incomplete in that it was placed on the vehicle itself and not on the parts of the M-type multi-piece rim assembly so that a tire buster such as the plaintiff would not come in contact with the statement and would not have the benefit of the purported warning when he was in the process of inflating or deflating multi-piece rim assemblies which had been removed from the vehicle.

10. Plaintiff states that the conduct and failure of defendants Goodyear and FMC and their individual officers and employees acting as the agents of Goodyear and FMC, were in willful, wanton, reckless and grossly negligent disregard for the safety of the public and particularly the plaintiff in that defendants' conduct was motivated solely by profit and convenience without regard to safety or preservation of human life and was oppressive, and as a result of the aforesaid, plaintiff is entitled to exemplary damages.

11. Plaintiff has sustained actual damage in the sum of Two Million Five Hundred Thousand Dollars ($2,500,-000.00), and seeks exemplary damages in the sum of Twenty-Five Million Dollars ($25,000,000.00).

WHEREFORE, plaintiff prays judgment against defendants in Count I in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) actual damages, and Twenty-Five Million Dollars ($25,000,000.00) exemplary damages, and his costs herein expended.

COUNT II.

Comes now plaintiff and for Count II of his Complaint states as follows:

1. Plaintiff is an individual citizen of the State of Kansas, residing in Solomon, Dickinson County, Kansas; The Goodyear Tire & Rubber Company (Goodyear) is a corporation organized and existing pursuant to the laws of the State of Ohio with principal offices for the transaction of business in Akron, Summit County, Ohio; F.M.C. Corporation (FMC) is a Delaware corporation with principal offices for the transaction of business in a state other than Kansas; so that defendants are citizens of states other than Kansas and not citizens of Kansas and there is complete diversity of citizenship between the parties.

2. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00); exclusive of interest and costs, to-wit: Twenty-Seven Million Five Hundred Thousand Dollars ($27,500,000.00), and this Court has jurisdiction in the first instance pursuant to Section 1332(a) U.S.C.

3. At all times hereinafter alleged defendants were duly authorized to transact business in the State of Kansas and have offices and distribution centers for their business within the District of Kansas.

4. On or about July 7, 1977, an M-type multi-piece rim manufactured by defendant Goodyear and sold and distributed by defendants Goodyear and FMC, exploded at Salina, Saline County, Kansas, while plaintiff was attempting to deflate it, causing catastrophic injuries to plaintiff and resulting in his total and permanent disability.

5. At the time of his injuries, plaintiff was eighteen (18) years old and had been employed by Royal Tire Company, Salina, Saline County, Kansas, for approximately one month. Plaintiff and a co-employee of the Royal Tire Company, under the supervision of another Royal Tire Company employee, repaired a tire and tube removed from the M-type rim and inflated the assembly in a safety cage, using a clamp-on air chuck attached to an air hose which was operated by remote control and an automatic shut-off device. Plaintiff and his co-employees removed the inflated assembly from the safety cage and the M-type rim explosively separated and struck plaintiff causing the following injuries, without limitation; total loss of vision in the left eye, severe limitation of vision in the right eye, loss of sense of taste, loss of sense of smell, skull fracture, comminuted facial fractures, brain damage, loss of memory, facial disfigurement, separation of both knees, both elbows, and both shoulders, all of which caused great pain, mental anguish, psychological and emotional derangement and suffering, and all of which are disabling and permament in nature and which have required and will continue to require medical treatment and expenses, and which deprive plaintiff of his ability to support and maintain himself.

6. Defendant Goodyear, and certain executive officers and employees conspiring with other manufacturers defrauded plaintiff, the United States of America, the several States, state and federal courts, litigants, and the general public for the purposes of avoiding a manufacturers' noti-

fication campaign, commonly known as recall or retrofit, and avoiding liability to litigants and claimants killed, blinded, maimed and otherwise injured by multi-piece rims, over a period exceeding fifty years, including specific acts and conduct similar thereto hereafter more fully set forth.

7. POLITICAL SLUSH FUND. Goodyear established and utilized political slush funds into which it diverted corporate assets in excess of One Million Dollars ($1,000,000.00), which were used for illegal purposes including the avoidance of a government investigation, discontinuance of production and a recall campaign of certain multi-piece rims. During the government investigation from 1969 through 1973, Goodyear made illegal domestic political payments, the distribution of which was directed by company executives, which payments were utilized to influence the aforesaid government investigation and proposed action.

8. FALSE REPRESENTATIONS AS TO THE NUMBER AND SEVERITY OF RIM EXPLOSIONS. Goodyear deliberately and fraudulently understated and minimized the number of known incidents, claims and lawsuits involving multi-piece rims in testimony and official responses to inquiries by the United States Department of Transportation, investigatory departments of various states and in various lawsuits in state and federal district courts.

9. VEHICLE MOUNTING AND DEMOUNTING HAZARD. Goodyear deliberately and fraudulently withheld information from the United States Department of Transportation, the investigatory departments of various states and the federal district courts and state trial courts that multi-piece truck rims of the type which blinded plaintiff have a proclivity for explosions during handling, mounting and demounting on vehicles thereby causing potentially lethal explosions and injury or death to any person attempting to

handle, mount or demount an inflated multi-piece rim assembly onto or from a vehicle.

10. WARNING STICKERS. Goodyear deliberately and fraudulently conspired with others at secret and clandestine meetings at the Mayflower Hotel in Washington, D.C. and elsewhere to remain silent and avoid adequate warning to users of multi-piece truck rim components by failing to attach warning stickers to rims, by representing that it was impossible to devise a sticker which would be prominent and would adhere to new and existing rims, by abandoning their warning sticker projects for multi-piece rims and encouraging, agreeing and conspiring with other rim manufacturers to abandon existing and proposed warning sticker programs, all for the purposes of avoiding approximately $1,000,000.00 in expense and avoiding the admission of liability for products liability rim explosion cases at the expense of human life and health including that of the plaintiff.

11. SAFETY CAGE AS THE SOLUTION. Goodyear deliberately and fraudulently misrepresented that safety cages and other restraining devices would effectively eliminate death and injury from multi-piece rim explosions although they knew that numerous explosions resulting in blinding, maiming, crippling and death were and are occurring during vehicular mounting and demounting, while vehicles are in service and during routine tire maintenance, inflation and deflation of rim assemblies mounted on vehicles, and Goodyear deliberately and fraudulently failed to advise and acknowledge that safety cages and restraining devices are useless at such times and would not avoid numerous rim explosion occurrences involving death and serious injury.

12. WARNING AND MATCHING LITERATURE AS THE SOLUTION. Goodyear deliberately and fraudulently

misrepresented that printed warning materials and rim component matching literature were an alternative solution to the multi-piece rim explosion hazard although Goodyear knew that such printed literature and materials rarely reached the ultimate users and tire busters, and that explosion injuries and death would continue regardless of such literature and materials because defendant never intended to distribute the literature promulgated by the federal government, failed to distribute such literature, knew that the literature was difficult or impossible for most users to comprehend, and even if disseminated and comprehended that compliance was impossible, impractical and ineffective in preventing death and injury.

13. RUN FLAT HAZARD. Goodyear deliberately and fraudulently failed to disclose the results of tests and complaints indicating that a majority of multi-piece rim assemblies, including the type which injured plaintiff, become hazardous whenever the tire assembled thereon becomes deflated on the highway causing an unreasonable risk to the public which, if fully known to the National Highway Traffic Safety Administration, would have resulted in the promulgation of federal motor vehicle safety standards, recall and retrofit which would have eliminated the subject rim prior to the time it injured plaintiff.

14. DISTRIBUTION OF WARNING LITERATURE AND CONSPIRACY OF SILENCE. Goodyear deliberately and fraudulently withheld information, instructional and warning material and failed to fulfill their promises to the Department of Transportation and their obligations to the public to distribute warning literature and rim matching information.

15. MISMATCH HAZARD. Goodyear deliberately and fraudulently misrepresented to the National Highway Traffic Safety Administration, the investigative departments

of various states, and the state and federal courts that numerous components of one type or designation can be safely matched with rim components of other types and designation distributed by different manufacturers, that the configuration and specifications of the same or similar rims component parts of the same and of different manufacturers are compatible and safe, and that all extant rims are clearly, unequivocally and completely identified as to manufacturer, type and size so that the users thereof can safely match them when defendant knew that such representations were false.

16. SINGLE-PIECE RIM AS THE SAFE SOLUTION. Goodyear deliberately and fraudulently failed to disclose that it had developed during the 1950s a completely safe single-piece drop center rim for usage on all trucks which if promoted would entirely eliminate the rim explosion hazard and conspired with others to keep silent with respect to the development of the state of the art in order to maintain its position in the truck market, which activity was motivated solely by profit and at the expense of life and health of the public, including the plaintiff.

17. The plaintiff, the United States Department of Transportation, authorities in the several States and the general public reasonably relied on Goodyear to make full and honest disclosures with respect to the design, production, distribution, warning and instruction of their truck rims and as a result of the foregoing fraudulent misrepresentations plaintiff sustained blinding and crippling injuries to the actual damage of plaintiff in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

18. As a result of the foregoing fraudulent misrepresentations of Goodyear, plaintiff is entitled to exemplary damages in the sum of Twenty-Five Million Dollars ($25,000,000.00).

19. Most of the acts, omissions and misrepresentations of defendant Goodyear occurred or were planned at defendant's principal place of business in Akron, Ohio. Plaintiff requests that the Court take judicial notice of the law of the State of Ohio which provides for the recovery of exemplary damages against a corporation for the tortious acts of its agents within the scope of their employment for their failure to redesign or recall a product or to warn the public when they knew the design of the product posed a grave danger to the lives or property of consumers.

WHEREFORE, plaintiff prays judgment against defendants in Count II in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) actual damages and Twenty-Five Million Dollars ($25,000,000.00) exemplary damages and his costs herein expended.

Lehman, Guilfoyle & Hinkle,
By /s/ William A. Guilfoyle,
William K. Guilfoyle,

Niewald, Risjord & Waldeck,
By /s/ John C. Risjord,
John C. Risjord,
Attorneys for Plaintiff.

DEMAND FOR TRIAL BY JURY
Plaintiff demands trial
by jury in Wichita, Kansas.

Complaint.

In the United States District Court for the Western District of Missouri, Western Division.

The Firestone Tire & Rubber Company, an Ohio corporation, Plaintiff, v. The Home Insurance Company, a New York corporation, Defendant. No. 79-0961-CV-W-1.

Filed: Oct. 25, 1979.

COMPLAINT

1. Plaintiff, The Firestone Tire & Rubber Company (''Firestone'') is a corporation incorporated under the laws of the State of Ohio with its principal place of business in the State of Ohio. Defendant, The Home Insurance Company (''Home''), is a corporation incorporated under the laws of the State of New York with its principal place of business in the State of New York. The amount in controversy exceeds, exclusive of interest and costs, $10,000.

2. From time to time until approximately December, 1975, Home and Firestone were parties to excess insurance contracts wherein Home undertook to furnish product liability coverage to Firestone (a copy of the most recent of said contracts is attached hereto as ''Exhibit A''). The prior contracts were substantially similar to the Exhibit A contract.

3. Following is a partial list of products liability actions which have been filed against Firestone in this Court including the date of filing and the alleged date of accident:

	Date Filed	Alleged Date of Accident
Butler v. The Firestone Tire & Rubber Company, et al.	Aug., 1978	May 1, 1975

Goodwin v. The Firestone Tire & Rubber Company, et al.	June, 1976	May 22, 1973
Rodriquez v. The Firestone Tire & Rubber Company, et al., (subsequently transferred to the Southern District of Texas)	Aug., 1978 (date of Second Amended Complaint)	Sept. 23, 1975

The plaintiffs' attorney in each case is John C. Risjord (''Risjord'') of Kansas City, Missouri, a member of the bar of this Court. For convenience, the above actions shall be referred to as the ''Risjord actions.''

4. Assuming the correctness of the allegations of the Risjord actions, they all, by date of occurrence and *ad damnum* fall within the coverage of the Exhibit A contract.

5. The Risjord actions contain highly unusual and inflammatory allegations including requests for punitive damages (the complaints in each are attached hereto as Composite Exhibit B).

6. In two of the Risjord actions (*Butler* and *Goodwin*) Home has served ''reservation of rights'' letters on Firestone (attached Composite Exhibit C) disclaiming coverage for both punitive and compensatory damages, in part because the complaints alleged intentional tort or misconduct. Firestone has pending approximately 100 cases involving bus and truck wheels and rim components, many of which are under the Home coverage. Home has never served such a notice in a wheel or rim case except in the Risjord actions.

7. Pursuant to the provisions of the Exhibit A contract and preceding contracts Home has demanded and received access to all Firestone rim and wheel case files, documents, reports, and other information concerning such cases for

which Home has coverage, and Home representatives have met with and discussed Firestone's defense strategies, positions and tactical problems with numerous of Firestone's attorneys regarding the handling of those cases.

8. Risjord also serves as Lead and Liaison Counsel for all plaintiffs in consolidated proceedings in this Court bearing number MDL-362. MDL-362 includes the Risjord actions as well as approximately 17 other wheel and rim cases against Firestone; the number changes because of tag-alongs. Several of those cases are within Home coverage.

9. Risjord currently represents Home in at least one matter unrelated to Firestone or wheels and rims. His firm, Messrs. Niewald, Risjord & Waldeck of Kansas City, Missouri, has held out Home as its most important client continuously for approximately 20 years.

10. This Court has found that the foregoing legal representations constitute a conflict of interests by Risjord and an "appearance of impropriety." As an alternative to Mr. Risjord's disqualification, this Court has given Mr. Risjord the opportunity of obtaining the consents of all parties involved. Risjord obtained from Home a limited consent permitting him to continue representing it in the action referred to in the preceding paragraph. Such consent does not purport to allow Risjord to sue Firestone in Home insured cases or to act as lead counsel to all other counsel in all of the other Home insured cases.

11. Home has known of Risjord's conflict of interests since it was created and has also known that Firestone has advised the Home that, due to the Home's fiduciary obligation to Firestone, and its knowledge of Firestone's defense strategies, capabilities and settlement attitudes, Firestone expected the Home to join with it in the disqualification of Risjord due to the conflicts hereinbefore alleged. Despite

such fact, the Home has taken no action whatever to prevent such conflict from continuing. This failure constitutes a serious, intentional and malicious breach by Home of its insurance and fiduciary duties to Firestone created by Exhibit A and preceding contracts. One inference to be drawn from this failure (and consequent breach) is that Home is in accord with and wishes to aid Risjord's attempts to show that Firestone has committed intentional torts not covered by Home's policies, notwithstanding the fact that such a theory may not be in the best interest of the plaintiffs. The relationship creates a gross and significant opportunity for collusion and misuse of the information which Home has learned and demanded from Firestone in the defense of its cases.

12. There is presently pending before this Court Firestone's motion to have Risjord held in contempt for failing to comply with this Court's order of August 16, 1979. If the Court agrees that the Home consent was not in compliance with its order, there is a danger that Home will provide a broader consent thereby enabling Risjord to continue in the litigation and his pursuance of an intentional tort theory which Home claims it does not cover. It is Firestone's belief that Home will provide another broader consent. This would constitute a severe, intentional and malicious breach by Home of its fiduciary duties to Firestone created by Exhibit A and preceding contracts and would cause irreparable injury to Firestone.

WHEREFORE, Firestone requests the following relief:

A. That the Court adjudge and declare that Home's inaction with respect to Risjord's conflict of interests is a breach of its fiduciary duty to its insured, Firestone.

B. That the Court adjudge and declare that the giving by Home of a consent which complies with this Court's

order of August 16, 1979 would constitute a breach by Home of its fiduciary duty to Firestone.

C. That the Court adjudge and declare that because the aforesaid breach and intentional and malicious conduct Home is barred from disclaiming compensatory and/or punitive damage coverage in any case falling within the Exhibit A or preceding contracts.

D. That the Court grant a preliminary injunction preventing Home from giving a consent which complies with this Court's order of August 16, 1979.

E. That the Court enter an Order making said preliminary injunction permanent.

F. That the Court enter judgment in favor of Firestone and against Home as follows:

i. all actual damages sustained by Firestone as a result of Home's breach;

ii. punitive damages (because of the intentional and malicious nature of Home's breach) in such amount as the Court may deem necessary (based upon Home's assets and income) to provide a deterrent against such conduct in the future by Home and those similarly situated.

William Freivogel,
Robert W. Sacoff,
Monica Carroll,
Ross, Hardies, O'Keefe,
Babcock & Parsons,

William H. Sanders,
James M. Warden,
Blackwell, Sanders, Matheny,
Weary & Lombardi,

By /s/ William H. Sanders
Attorneys for The Firestone Tire & Rubber Company.

Exhibit A.

THE HOME INSURANCE COMPANY.

New Hampshire

ITEM 1. Insured's Name and Mailing Address. The Firestone Tire & Rubber Company (See General Endorsement No. 1) 1200 Firestone Parkway, Akron, Ohio. Inception (Mo. Day Yr.): 12/1/75. Expiration (Mo. Day Yr.):1/1/76. Years: Time. Producer No. 07906. CPC 261.

NEW YORK OFFICE, Producer, Marsh & McLenna, Inc., One Woodward Ave., Detroit, Michigan.

FROM: December 1, 1975, 12:01 AM, TO: January 1, 1976, Standard Time at the address of the Named Insured as stated herein.

ITEM 2. LIMITS OF LIABILITY (As Per Insuring Agreement No. 2)

LIMIT IN ALL IN RESPECT OF EACH OCCURRENCE $ 2,000,000.00.

LIMIT IN THE AGGREGATE FOR EACH ANNUAL PERIOD WHERE APPLICABLE $ 2,000,000.00.

ITEM 3. PREMIUMS

THE PREMIUM IS BASED UPON Flat Charge During the Policy Period; MINIMUM PREMIUM, $71,250.00; ADVANCED PREMIUM, $71,250.00

In Witness Whereof, the said THE HOME INSURANCE COMPANY, MANCHESTER, NEW HAMPSHIRE has caused these Presents to be signed by its President and attested by its Secretary, in the City of Manchester, New Hampshire, and this policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by a duly authorized Representative of the Company at place of issue.

/s/ Joseph F. Quinn
Secretary

/s/ R. H. Tullen. Jr.
President

Date 1/15/76eg

SECTION A
THE HOME INSURANCE COMPANY'S
MANUSCRIPT EXCESS LIABILITY POLICY

(A stock insurance company herein called the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the insuring agreements, limits of liability, definitions, exclusions, conditions, and other terms of this policy:

INSURING AGREEMENTS

I. COVERAGE

The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability

(a) imposed upon the Insured by law,

or (b) assumed under contract or agreement by the Named Insured and/or any officer, director, stockholder, partner or employee of the Named Insured, while acting in his capacity as such,

for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of:

(i) Personal Injuries, including death at any time resulting therefrom,

(ii) Property Damage,

(iii) Advertising Liability,

caused by or arising out of each occurrence happening anywhere in the world.

II. LIMIT OF LIABILITY

The Company shall only be liable for the ultimate net loss the excess of either

(a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances.

or (b) $25,000 ultimate net loss in respect of each occurrence not covered by underlying insurances,

(hereinafter called the "underlying limits"):
and then only up to a further sum as stated in Item 2 of the Declarations in all in respect of each occurrence—subject to a limit as stated in Item 2 of the Declarations in the aggregate for each annual period during the currency of this policy, separately in respect of Products Liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employees of the Insured.

In the event of reduction or exhaustion of the agregate limits of liability under said underlying insurance by reason of losses paid thereunder, this policy shall

(1) in the event of reduction pay the excess of the reduced underlying limit

(2) in the event of exhaustion continue in force as underlying insurance.

The inclusion or addition hereunder of more than one Insured shall not operate to increase the Company's limit of liability.

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:

1. INSURED

Named Insured: As stated in Item 1 of the Declarations forming a part hereof and/or subsidiary, associated, affiliated companies or owned and controlled companies as now or hereafter constituted and of which prompt notice has been given to the Company (Hereinafter called the "Named Insured").

The unqualified word "Insured", wherever used in this policy, includes not only the Named Insured but also:—

(a) any officer, director, stockholder, partner or employee of the Named Insured, while acting in his capacity as such, and any organization or proprietor with respect to real estate management for the Named Insured;

(b) any person, organization, trustee or estate to whom the Named Insured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Insured or of facilities of the Named Insured or used by them;

(c) any additional insured (not being the Named Insured under this policy) included in the Underlying insurances, subject to the provisions in Condition B; but not for broader coverage than is available to such additional Insured under any underlying insurances as set out in attached Schedule;

(d) with respect to any automobile owned by the Named Insured or hired for use in behalf of the Named Insured, or to any aircraft owned by or hired for use in behalf of the Named Insured, any person while using such automobile or aircraft and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is with the permission of the Named Insured. The insurance extended by this sub-division (d), with respect to any person or organization other than the Named Insured, shall not apply—

1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service sta-

tion, or public parking place, with respect to any occurrence arising out of the operation thereof;

2. to any manufacturer of aircraft, engines, or aviation accessories, or any aviation sales or service or repair organization or airport or hangar operator or their respective employees or agents with respect to any occurrence arising out of the operation thereof;

3. with respect to any hired automobile or aircraft, to the owner thereof or any employee of such owner. This sub-division (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

2. PERSONAL INJURIES

The term ''Personal Injuries'' wherever used herein means bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination (except where it is a violation of a statute or regulation prohibiting such) humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities.

3. PROPERTY DAMAGE

The term ''Property Damage'' wherever used herein shall mean loss of or direct damage to or destruction of tangible property (other than property owned by the Named Insured).

4. ADVERTISING LIABILITY

The term ''Advertising Liability'' wherever used herein shall mean:—

(1) Libel, slander or defamation;

(2) Any infringement of copyright or of title or of slogan;

(3) Piracy or unfair competition or idea misappropriation under an implied contract;

(4) Any invasion of right of privacy;

committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's Advertising activities.

5. OCCURRENCE

The term "occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

6. ULTIMATE NET LOSS

The term "Ultimate Net Loss" shall mean the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

7. AUTOMOBILE

The term ''automobile'', wherever used herein, shall mean a land motor vehicle, trailer or semi-trailer.

8. AIRCRAFT

The term ''aircraft'' wherever used herein, shall mean any heavier than air or lighter than air aircraft designed to transport persons or property.

9. PRODUCTS LIABILITY

The term ''Products Liability'' means

(a) Liability arising out of goods or products manufactured, sold, handled or distributed by the Named Insured or by others trading under his name if the occurrence occurs after possession of such goods or products has been relinguished to others by the Named Insured or by others trading under his name and if such occurrence occurs away from premises owned, rented or controlled by the Named Insured; provided such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or any property, other than such container, rented to or located for use of others but not sold;

(b) Liability arising out of operations, if the occurrence occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the Named Insured; provided operations shall not be deemed incomplete because improperly of defectively performed or because further operations may be required pursuant to an agreement; provided further the following shall not be deemed to be ''operations'' within the meaning of this paragraph; (i) pick-up or delivery, except from or onto a railroad car, (ii) the maintenance of vehicles, owned or used by or in behalf of the insured, (iii) the existence of

tools, uninstalled equipment and abandoned or unused materials.

10. ANNUAL PERIOD

The term "each Annual Period" shall mean each consecutive period of one year commencing from the inception date of this Policy.

THIS POLICY IS SUBJECT TO THE FOLLOWING EXCLUSIONS:

This policy shall not apply:—

(a) to any obligation for which the Insured or any company as its insurer may be held liable under any Workmen's Compensation, unemployment compensation or disability benefits law provided, however, that this exclusion does not apply to liability of others assumed by the Names Insured under contract or agreement;

(b) to claims made against the Insured;

(i) for repairing or replacing any defective product or products manufactured, sold or supplied by the Insured or any defective part or parts thereof nor for the cost of such repair or replacement;

(ii) for the loss of use of any such defective product or products or part or parts thereof;

(iii) for improper or inadequate performance, design or specification; but nothing herein contained shall be construed to exclude claims made against the Insured for personal injuries or property damage (other than damage to the product of the Insured) resulting from improper or inadequate performance design or specification;

(c) with respect to advertising activities, to claims made against the Insured for:

(i) failure or performance of contract, but this shall not relate to claims for unauthorized appropriation of ideas based upon alleged breach of an implied contract;

(ii) infringement of registered trade mark, service mark or trade name by use thereof as the registered trade mark, service mark or trade name of goods or services sold, offered for sale or advertised, but this shall not relate to titles or slogans;

(iii) incorrect description of any article or commodity;

(iv) mistake in advertised price;

(d) except in respect of occurrences taking place in the United States of America its territories or possessions, or Canada, to any liability of the Insured directly or indirectly occasioned by, happening through or in consequences of war, invasion, acts of foreign enemies, hostilities, (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

Except insofar as coverage is available to the Insured in the underlying insurances as set out in the attached Schedule, this policy shall not apply:

(e) to liability of any insured hereunder for assault and battery committed by or at the direction of such Insured except liability for Personal Injury or Death resulting from any act alleged to be assault and battery committed for the purpose of preventing or eliminating danger in the operation of aircraft, or for the purpose of preventing personal injury or property damage; it being understood and agreed that this exclusion shall not apply to the liability of the Named Insured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;

(f) with respect to any aircraft owned by the Insured except liability of the Named Insured for aircraft not owned by them; it being understood and agreed that this exclusion shall not apply to the liability of the Named Insured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;

(g) with respect to any watercraft owned by the insured, while away from premises owned, rented or controlled by the Insured, except liability of the Named Insured for watercraft not owned by them; it being understood and agreed that this exclusion shall not apply to the liability of the Named Insured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;

(h) to any employee with respect to injury to or the death of another employee of the same Employer injured in the course of such employment.

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS:—PREMIUM

The premium for this policy shall be computed on the basis set forth under Item No. 3 of the policy declarations.
Upon expiration of this policy or its termination during the policy period, the earned premium shall be computed as thus defined. If the earned premium thus computed is more than the advance premium paid, the named insured shall immediately pay the excess to the company; if less, the company shall return the difference to the named insured; but the company shall receive and retain the annual minimum premium for each twelve (12) months of the policy period.

In the event of additional Insureds being added to the coverage under the Underlying Insurance during currency hereof prompt notice shall be given to The Company and

if an additional premium has been charged for such addition on the Underlying Insurances. The Company shall be entitled to charge an appropriate additional premium hereon.

PRIOR INSURANCE AND NON CUMULATION OF LIABILITY.

It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.

Subject to the foregoing paragraph and to all the other terms and conditions of this policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy. The Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.

D. SPECIAL CONDITIONS APPLICABLE TO OCCUPATIONAL DISEASE

As regards personal injury (fatal or non-fatal) by occupational disease, sustained by an employee of the Insured, this policy is subject to the same warranties, terms and conditions, (except as regards the premium, the amount and limits of liability and the renewal agreement, if any) as are contained in or as may be added to the underlying insurances prior to the happening of an occurrence for which claims is made hereunder.

E. INSPECTION AND AUDIT

The Company shall be permitted, at all reasonable times during the policy period to inspect the premises,

plants; machinery and equipment used in connection with the Insured's business, trade or work, and to examine the Insured's books and records at any time during the currency hereof and within one year after final settlement of all claims so far as the books and records relate to any payments made on account of occurrences happening during the term of this policy.

F. CROSS LIABILITY

In the event of claims being made by reason of personal injuries suffered by any employee or employees of one Insured hereunder for which another Insured hereunder is or may be liable, then this policy shall cover such Insured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Insured hereunder.

In the event of claims being made by reason of damage to property belonging to any Insured hereunder for which another Insured is, or may be liable then this policy shall cover such Insured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Insured hereunder.

Nothing contained herein shall operate to increase Company's limit of liability as set forth in Insuring Agreement II.

G. NOTICE OF OCCURRENCE

Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which in the event that the Insured should be held liable, is likely to involve this policy, notice shall be sent to the Company as soon as practicable, provided, however, that failure to give notice of any occurrence which at

the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claim.

H. ASSISTANCE AND CO-OPERATION

The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but The Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involve The Company, in which event, the Insured and The Company shall co-operate in all things in the defense of such claim, suit or proceeding.

I. APPEALS

In the event the Insured or the Insured's underlying insurers elect not to appeal a judgment in excess of the underlying limits, The Company may elect to make such appeal at their cost and expense, and shall be liable for the taxable costs and disbursements and interest incidental thereto, but in no event shall the liability of The Company for ultimate net loss exceed the amount set forth in Insuring Agreement II for any one occurrence and in addition the cost and expense of such appeal.

J. LOSS PAYABLE

Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Insured shall make a definite claim for

any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and The Company. If any subsequent payments shall be made by the Insured an account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

K. BANKRUPTCY AND INSOLVENCY

In the event of the bankruptcy or insolvency of the Insured or any entity comprising the Insured, The Company shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.

L. OTHER INSURANCE

If other valid and collectible insurance with any other insurer is available to the Insured covering loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

M. SUBROGATION

Inasmuch as this policy is "Excess Coverage", the Insured's right of recovery against any person or other

entity cannot be exclusively subrogated to the Company. It is, therefore, understood and agreed that in case of any payment hereunder, the Company will act in concert with all other interests (including the Insured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Insured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Company is then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly, the interests (including the Insured) of whom this coverage is in excess are entitled to claim the residue, if any. Expenses necessary to the recovery of any such amounts shall be apportioned between the interests (including the Insured) concerned, in the ratio of their respective recoveries as finally settled.

N. CHANGES

Notice to or knowledge possessed by any person shall not effect a waiver or change in any part of this policy or estop The Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by The Company.

O. ASSIGNMENT

Assignment of interest under this policy shall not bind The Company unless and until their consent is endorsed hereon.

P. CANCELLATION

This policy may be cancelled by the named insured by mailing to the company written notice stating when thereafter the cancellation shall be effective. This pol-

icy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than 30 days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

Q. MAINTENANCE OF UNDERLYING INSURANCE

It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as they would have been had the Insured complied with the said condition.

.....

Authorized Representative

Non-Premium Endorsement, Endorsement No. Section A.

Issued by:—The Home Insurance Company, POLICY NUMBER, HEC 9 20 85 90, Named Insured: The Firestone Tire & Rubber Co., EFFECTIVE DATE AND TIME OF ENDORSEMENT: 12/1/75, DATE PREPARED: 1/15/76, PRODUCER: Marsh & McLennan, Inc., Producer No. OPC 07906-261.

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchanged.

In consideration of the premium charged, it is agreed that inasmuch as the following coverages:

Comprehensive General Liability, Products Liability and Automobile Liability are self insured (no primary being in force) then the following wording applies:

Where reference in the Policy is made to Underlying Insurance, such reference is further extended to include "self insurance". Otherwise all other remaining definitions, conditions and exclusions apply to these coverages.

In the Supreme Court of the United States

October Term, 1979

No. 79-1420

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

Statement of the Case 1
Questions Presented 7

Reasons for Denying a Writ of Certiorari—

I. The existence of a conflict among the Circuit Courts of Appeal does not justify review by this Court of the question of the handling of a denial of a motion to disqualify on appeal since there exists no "live" controversy as to that issue and because the question itself is not appropriate for review 7

II. Consideration of the question of whether the District Court abused its discretion would not provide this Court the opportunity to consider any significant or substantial question of federal law such as is required for granting certiorari 13

Conclusion 19

Table of Authorities Cited

CASES

Acorn Printing Company v. Brown, 385 S.W.2d 812 (Spr. Mo. App. 1964) 17

Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) 12,15, 18

Board of Education of the City of New York v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) 12, 14

Brown Shoe Company v. United States, 370 U.S. 294 (1962) 12

Central Milk Producers Cooperative v. Sentry Foods Stores, Inc., 573 F.2d 988 (8th Cir. 1978) 18

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949) 11, 12

Community Broadcasting of Boston, Inc. v. Federal Communications Commission, 546 F.2d 1022 (D.C. App. 1976) 12
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 11, 12
Fred Weber, Inc. v. Shell Oil Company, 566 F.2d 602 (8th Cir. 1977) 15
Gillespie v. United States Steel Corporation, 379 U.S. 148 (1964) 11-12
In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976) 17, 18
International Business Machines Corporation v. Levin, 579 F.2d 271 (3rd Cir. 1978) 15, 17
International Electronics Corporation v. Flanzer, 527 F.2d 1288 (2d Cir. 1975) 12
Meat Price Investigators Association v. Spencer Foods, Inc., 572 F.2d 163 (8th Cir. 1978) 14, 17
Melamed v. ITT Continental Baking Company, 592 F.2d 290 (6th Cir. 1979) 8, 13, 18
Messing v. FDI, Inc., 439 F.Supp. 776 (D.N.J. 1977) 17
Muskrat v. United States, 219 U.S. 346 (1911) 11
Payne v. St. Louis Grain Corporation, 562 S.W.2d 102 (St. L. Mo. App. 1977) 18
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 14
Rudolph v. United States, 370 U.S. 269 (1962) 14, 16
S. S. Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 9
Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corportation, 496 F.2d 800 (2d Cir. 1974) 8, 12
Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, 518 F.2d 751 (2d Cir. 1975) 15
W. T. Grant Company v. Haines, 531 F.2d 671 (2d Cir. 1976) 12, 14

Waters v. Western Company of North America, 436 F.2d 1072 (10th Cir. 1971) 15

STATUTES

United States Code, Title 28, Sec. 1291 ..... 6, 8
United States Code, Title 28, Sec. 1292(b) 5, 8, 13
United States Code, Title 28, Sec. 1651 13

RULES OF COURT

Rule 19 of the Rules of the Supreme Court of the United States 14
Rule 43 of the Rules of the United States District Court of the Western District of Missouri 5
Code of Professional Responsibility of the Missouri Supreme Court, Rule 4, Disciplinary Rule 5-105(A) 4, 17
Code of Professional Responsibility of the Missouri Supreme Court, Rule 4, Disciplinary Rule 5-105(C) 4, 5, 17

In the Supreme Court of the United States

October Term, 1979

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In re:

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Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The origin of the petition of The Firestone Tire & Rubber Company (hereinafter "Firestone") was a motion filed May 23, 1979, (Record 62) to disqualify respondent John C. Risjord (hereinafter "Risjord") from the representation of four sets of plaintiffs in suits against Firestone

which cases and others are pending in multi-district proceedings styled *Multi-Piece Rim Litigation* before the United States District Court for the Western District of Missouri.[1] The respective Complaints filed by those plaintiffs against Firestone contain essentially identical allegations based upon defective products manufactured by Firestone. The Complaints also allege that Firestone, and in some cases Goodyear, negligently, willfully and intentionally committed some twelve specific failures or deliberate acts, withheld information, misrepresented materials facts and engaged in fraudulent misrepresentation. (Record 324-412).

Home Insurance Company is the insurer for Firestone, and Firestone's claim of conflict arises out of representation of Home by Risjord in an unrelated case. Under its policy, Home has no duty to provide a defense for Firestone in the Multi-Piece Rim cases. In one of the four cases, Home does not afford coverage to Firestone and in others provides coverage apparently over a self-retained limit of $500,000. (Supplemental Record 454, 456, Ex. A).

In the "Second Pretrial Order" entered by the District Court following a hearing on August 10, 1979, the Court set forth the stipulated facts regarding the status and relationship between Risjord and Home, and out of which the present dispute arose as follows:

* * *

---

1. All cases involve alleged injuries or death to persons who claim they were struck by an exploding metal wheel manufactured by Firestone. The cases are the *Rodriquez* case, filed in 1977, and alleging brain damage to a teenager; the *Goodwin* case, filed in 1978 by a spouse and four minor children for wrongful death; the *Butler* case, filed in August of 1978, and alleging blindness and other injuries to plaintiff; and the *Hale* case, filed in April of 1978, and alleging a traumatic amputation of plaintiff's nose. (Record 324-412).

At the pretrial conference that was held on August 10, 1979, the following facts were stipulated by Mr. Risjord and Firestone:

> 1) For the past several years, and until the present time, Mr. Risjord's law firm has included Home Insurance Company in its list of clients published in the Martindale-Hubbell Law Directory;
>
> 2) During the past several years Mr. Risjord's law firm has represented Home Insurance Company in litigation that was not related to this pending case;
>
> 3) Neither Mr. Risjord nor his law firm has ever represented Home Insurance Company in litigation that is related to this pending action;
>
> 4) Home Insurance Company does not pay a retainer fee to Mr. Risjord or to his law firm, but does employ his law firm from time to time on a case-by-case basis;
>
> 5) Mr. Risjord's firm was employed in January, 1974, to represent Home Insurance Company in a suit on a fire insurance policy, which suit is presently pending in the Circuit Court of Jackson County, Missouri [*Cannova* litigation];
>
> 6) In at least two of the cases consolidated into this multidistrict proceeding, Mr. Risjord represents plaintiffs who have named Firestone as a defendant in their case;
>
> 7) Home Insurance Company is the liability insurance carrier who insures Firestone against excess liability in the two cases in which Mr.

> Risjord's clients have sued Firestone. (Transcript, Pretrial Conf., August 10, 1979; Firestone Pet., App. A, pp. 1-2).

These stipulations arose out of a considerable record consisting of briefs, related pleadings, affidavits and the depositions of Risjord.[2]

The District Court considered the question of conflict and the assertion of Firestone, albeit unfounded and unsupported, of the possibility of collusion between Risjord and Home in his handling of the present actions. After having considered all the facts before it, the District Court found that Disciplinary Rule 5-105(A) and (C) of the Code of Professional Responsibility adopted by the Missouri Supreme Court and by the United States District Court in

---

2. Risjord in his deposition described the *Cannova* lawsuit (*Cannova Enterprises, Inc. v. Great American Insurance Co., et al.*, in the Circuit Court of Jackson County) as the only one he handled for Home in ten years. (Risjord depo. 82). Risjord has represented the Home's fire insurance company as long as he practiced law, but had not represented the company writing casualty business since he left Lowell Knipmeyer 19 or 20 years ago. (Risjord depo. 77). The *Cannova* litigation resulted in a claim for libel being asserted against Risjord as a defendant (Risjord depo. 79) and Mr. Sanders, counsel for Firestone, was employed by St. Paul Fire & Marine to defend Risjord in that action. (Risjord depo. 80). Mr. Sanders knew of Risjord's representation of Home four years ago at a meeting with Risjord. (Risjord depo. 81). Risjord was totally unaware that Firestone Tire & Rubber Company was insured or reinsured by Home Insurance Company. (Risjord depo. 83). He had no recollection of ever doing anything on behalf of any insurer for Firestone or any subsidiary or affiliated company. (Risjord depo. 83). Risjord has suggested to his partners that their list of clients be alphabetized in Martindale-Hubbell but this has never been done. (Risjord depo. 90). In the last ten years, the number of cases in which his law firm handled work for the Home Insurance Company is very minimal and ordinarily stock companies split fire risks and a lead company hires counsel that represents the group, which is the way he happened to represent Home in this particular case. (Risjord depo. 92-93). Risjord has no recollection of defending a Home Insurance Company insured in the last 19 or 20 years, and he knows nothing of their way of undertaking to represent policyholders in litigation, and is unaware that his partners have. (Risjord depo. 93, 94).

its Rule 43, was applicable. In particular, the lower court determined that the representation by Risjord of Home Insurance Company in a totally unrelated fire claim and his representation of plaintiffs was a situation requiring either that Risjord withdraw from his representation of either plaintiffs or Home or that Risjord obtain the informed consents of plaintiffs and Home. The Court found from all the facts and arguments presented to it that this was a situation where it was obvious that Risjord could adequately represent the interests of Home and plaintiffs if each consented thereto, after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on their behalf. DR 5-105(C). The Court, following the guidelines of DR 5-105 (C), ordered Risjord to obtain consents from Home Insurance Company and from the plaintiffs he represented or, in the alternative, to terminate either his representation of the plaintiffs in the cases in which Firestone was a defendant, or his representation of Home Insurance Company. The District Court further certified this ruling for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Firestone Pet., App. A, pp. 1-6).

Following the Order of the District Court, Risjord obtained consents from plaintiffs and from Home Insurance Company and those consents were filed and incorporated into the record. (Record 301, 302, 303-312). Without following the provisions of 28 U.S.C. § 1292(b), Firestone took an appeal to the United States Court of Appeals for the Eighth Circuit arguing that the trial court had abused its discretion in making its factual findings and entering its disqualification order. During the pendency of the appeal, Risjord's representation of Home Insurance Company in the *Cannova* case was terminated by Home. (Supplemental Record 435-440). Risjord, in addition to responding to the

brief of appellant Firestone, filed a motion to obtain dismissal of the appeal asserting that the District Court's decision was not a final one under 28 U.S.C. § 1291.

The record submitted to the Circuit Court of Appeals included all the motions, arguments, pleadings and affidavits with respect to Firestone's motion to disqualify, the depositions of Risjord and the transcript of the second pretrial conference. All told it approximated 685 pages and contained all the factual data which had been before the District Court before it entered its order, as well as all documents relating to the consents and other indicia of compliance with the Court's Order by Risjord. Appellant Firestone submitted both an opening brief numbering 43 pages and a reply brief numbering 23 pages. Appellee Risjord submitted a brief numbering 47 pages. Based upon this record and the briefs before it, the Eighth Circuit Court of Appeals sitting *en banc* ruled unanimously with respect to Firestone's appeal as follows:

> In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean Foods* to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings. (Firestone Pet., App. B, p. 10).

From the judgment of the Court of Appeals affirming the District Court and remanding this matter for further proceedings, Firestone seeks review by this Court.

QUESTIONS PRESENTED

I. Should this Court grant certiorari to consider the question of the appealability, pursuant to 28 U.S.C. § 1291, of an order denying a motion to disqualify counsel where resolution of that question would have no effect upon the disposition of petitioner's motion to disqualify and where such question is not appropriate for Supreme Court review?

II. Should this Court grant certiorari to consider the question of whether the District Court abused its discretion where the question of that Court's abuse of discretion was fully considered by the United States Court of Appeals for the Eighth Circuit *en banc* and where no important question of federal law is involved?

REASONS FOR DENYING A WRIT OF CERTIORARI

I. The existence of a conflict among the Circuit Courts of Appeal does not justify review by this Court of the question of the handling of a denial of a motion to disqualify on appeal since there exists no "live" controversy as to that issue and because the question itself is not appropriate for review.

Since there is no live controversy in this case on the question of the handling of the denial motions to disqualify on appeal, there is no justification for review of that issue by this Court. The issue relating to appealability of orders denying a motion to disqualify was ruled only prospectively by the Court of Appeals and did not affect its decision on the merits. Thus, the granting of certiorari would do no more than have the Supreme Court review the exercise of discretion by the District Court, which has already been reviewed by the Court of Appeals. (See Point II, *infra*).

One of petitioner Firestone's bases, however, for seeking a writ of certiorari lies in that portion of the Court of Appeals opinion dealing with the appealability of an order denying a motion to disqualify pursuant to 28 U.S.C. § 1291, and Firestone's contention that it was aggrieved thereby. Although the Court of Appeals notes the availability to Firestone of 28 U.S.C. § 1292(b), even after certification by the District Court, and its failure to follow the requirements of that section, the Court nevertheless entertained Firestone's appeal, and upheld the action of the trial court as not involving an abuse of discretion. Even though the Court charted a course consistent with that chosen by the Sixth Circuit in *Melamed v. ITT Continental Baking Company*, 592 F.2d 290, 295 (1979), the issue of appealability of the order entered by the District Court herein was considered and ruled in favor of petitioner Firestone and against respondent Risjord. While the motion to dismiss and its denial by the Eighth Circuit gave the court the opportunity to consider and clarify its position on the handling of orders denying disqualification, Firestone cannot complain of the Court's decision on that issue, since Risjord's motion to dismiss Firestone's appeal was denied.

Conceding the divergence between the Circuits on this issue, the very nature of the ruling and opinion of the Eighth Circuit Court of Appeals makes this case an inappropriate one to resolve such a conflict, assuming this Court felt it were appropriate to do so. Affirming or reversing the Eighth Circuit's decision on that issue would not in any way affect the ruling in this case.

Firestone disagrees with the Eighth Circuit's opinion on appealability, citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, 496 F.2d 800 (2d Cir. 1974). Assuming that Firestone would continue to urge that position before this Court if certiorari were in fact granted,

there would be no "live" controversy between Firestone and Risjord with respect to appealability of the denial of motions to disqualify. Indeed, the only argument of Firestone which involves a controversy relates to the exercise of discretion by the District Court and that argument represents no conflict between the circuits, no significant question or issue of federal law and no question meriting consideration by this Court and is not, as described by petitioner, a question which is "ancillary" to the appealability issue. That issue of discretion has been decided and the adoption or rejection of the Eighth Circuit's prospective ruling on appealability by this Court will not affect Risjord's status. A burden should not be placed on Risjord to argue the appealability issue under such circumstances.

Where resolution of a conflict between the circuits of an issue presented to the Court can have no effect on the parties before the Court, an adequate basis or grounds for certiorari does not exist. *S. S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). In that action, this Court dismissed a writ of certiorari as having been improvidently granted, where it was determined that the issue giving rise to the original grant of certiorari would have no effect upon the litigants or upon the outcome of the case. The Court ruled that deciding such a case on certiorari would be improper, even though there existed a conflict between two of the Circuit Courts of Appeal on the very issue upon which certiorari had been granted originally. In making that ruling, this Court stated at page 184 as follows:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which

> these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

By the same token, resolution, in this case, of the conflict between the circuits on the question of how to deal with an order denying a motion to disqualify would serve no judicial function, and, therefore, parties seeking to raise it should await a day when it can be presented to the Court in the context of a live controversy with litigants on both sides of the issue, who are interested in the manner in which the conflict is resolved.

In an apparent attempt to make the appealability question into a live controversy, petitioner argues that with respect to the judgment of the Court of Appeals on the merits it did not get a fair hearing and that the action of the appellate court was "perfunctory," "pro forma" or little more than "footnote" treatment. Such contentions, having nothing to do with Firestone's Point I, are nothing more than speculation on its part and are without foundation in the record. In fact, the opinion of the Court of Appeals itself negates the petitioner's contention. In reaching its decision on the merits, the Court stated that ". . . we have carefully reviewed the pleadings and briefs. . . ." (Firestone Pet., App. B, p. 10). A substantial record and significant briefing were submitted to the Court and received full consideration by it. In all likelihood the treatmen of the Firstone position by the Court of Appeals demonstrates its conclusion that the Firestone position was completely lacking in merit.

Similarly, petitioner's contention that the Court of Appeals' denial of oral argument evinces a lack of concern by the Court for the merits of this case is without foundation. There exists no right to oral argument, and the absence of thirty minutes of oral argument cannot change

the fact that the entire record was considered by the Court. Thus, petitioner's efforts to create a controversy with respect to the appealability issue where none exists must fail.

Petitioner carries this point further by hypothesizing that the Court of Appeals was prevented from deciding the issues because of procedural considerations and the possibility that having discussed this appeal on the merits would have made the Eighth Circuit's prospective overruling of its prior appealability decisions much like an advisory opinion. However, petitioner fails to explain how a more detailed discussion of the merits of its appeal would have changed the character of the Court's opinion with respect to its new rule on the issue of appealability, let alone the result in this case. In fact, Firestone's raising of the specter of an advisory opinion such as discussed in *Muskrat v. United States,* 219 U.S. 346 (1911), only points to the fact that the granting of certiorari and the entertaining of the appealability question here would, according to petitioner's reasoning, place the Supreme Court in the position of doing just what petitioner Firestone complains, rendering an opinion which would be advisory only and have no effect upon the parties.

Finally, the appearance of a conflict between the Circuits in and of itself does not make the handling of motions to disqualify by the Circuit Courts one of such significance as to merit Supreme Court review in this case. Indeed, the appealability question in the context of this case is not of such significance or importance to merit review. Past considerations of the finality question in other instances before this Court have themselves been threshold questions to consideration of substantial or significant questions of federal law. *E.g., Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 545-47 (1949); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974); *Gillespie v. United States*

Steel Corporation, 379 U.S. 148 (1964); *Brown Shoe Company v. United States*, 370 U.S. 294 (1962). Further, on those occasions when the Supreme Court has spoken, it has set down guidelines for utilization by the Courts of Appeal recognizing the need for practical rather than technical application of these guidelines to the questions or situations involved. *Cohen v. Beneficial Industrial Loan Corporation, supra; Eisen v. Carlisle & Jacquelin, supra* at 170-171; *Gillespie v. United States Steel Corporation, supra* at 154; *Brown Shoe Company v. United States, supra.* Having set down those guidelines, their application by the Courts of Appeal each time the issue of finality is raised does not make their application, as here, a matter of significance for Supreme Court review.

Beyond this, the existence of a conflict among the circuits does not justify review by this Court for an additional reason. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, supra,* cited by Firestone as the "leading case," and its approach to the handling of the denial of motions to disqualify at the appellate level has come under severe criticism by the court that decided it. Criticism has arisen from the proliferation of motions to disqualify, often cited as a tactic of defense, and the resulting flood of appeals. *See* criticism found in, *Board of Education of the City of New York v. Nyquist,* 590 F.2d 1241 (2d Cir. 1979); *Allegaert v. Perot,* 565 F.2d 246 (2d Cir. 1977); *W. T. Grant Company v. Haines,* 531 F.2d 671 (2d Cir. 1976), and *International Electronics Corporation v. Flanzer,* 527 F.2d 1288 (2d Cir. 1975). *See also, Community Broadcast of Boston, Inc. v. Federal Communications Commission,* 546 F.2d 1022 (D.C. App. 1976), rejecting the approach of *Silver Chrysler.* The number of appeals seeking to overturn the exercise of discretion by lower courts in denying disqualification, and the doubtful advisability of entertaining such appeals, which result in delay and hardship upon plaintiffs obviously ac-

count for the position taken by the Eighth Circuit in the present case and the Sixth Circuit in *Melamed v. ITT Continental Baking Company, supra,* in overruling their prior decisions.

The above instances of criticism, together with the decisions of the Eighth Circuit and the Sixth Circuit indicate that the law on this issue is in a state of flux and that the conflict that now exists between the circuits is not yet settled. There are strong indications that the Courts of Appeal themselves, having now experienced this issue firsthand can resolve and appear to be resolving this question. Thus, intervention by the Supreme Court if it felt it appropriate to do so may not be necessary to resolve the conflict, and granting the instant petition would therefore result in a wasteful allocation of the Court's valuable resources. Furthermore, neither failing to resolve this issue nor postponing a resolution of it at the Supreme Court level will impose an undue burden on litigants who may be denied automatic appellate review since, as pointed out by the Eighth Circuit, and by the Sixth Circuit in *Melamed,* alternative avenues of review are open in appropriate or extraordinary cases under 28 U.S.C. § 1292(b) or 28 U.S.C. § 1651.

II. Consideration of the question of whether the District Court abused its discretion would not provide this Court the opportunity to consider any significant or substantial question of federal law such as is required for granting certiorari.

The true basis of Firestone's petition begins at page 12 of its petition since Firestone can neither be benefited nor aggrieved by the outcome of a decision by this Court on the issue of appealability. The question which Firestone seeks to have reviewed by this Court does not represent a substantial or significant question of federal law or

policy as required under Rule 19 of the Rules of this Court. No question beyond the litigants in this case or involving federal law with application beyond this case is involved as is required for Supreme Court review. *Rudolph v. United States,* 370 U.S. 269, 270 (1962); *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). That Firestone realizes this is obvious by its effort to characterize this point as "ancillary" to Point I (Firestone Pet., pp. 15, 20), which it is not. Thus, petitioner seeks to have this Court again review the facts and circumstances amply and adequately considered below both by the District Court and by the Court of Appeals *en banc* and to substitute its evaluation of those facts for that of those Courts. Nowhere in its petition does Firestone indicate, beyond its sense of individual indignation at the result below, any "special and important reasons" which would justify the Supreme Court's entertaining review of this case.

In this context, it must be remembered that the responsibility for promulgation of standards of ethical conduct and for enforcement of the *Code of Professional Responsibility* falls to the bar of the various states. It is not the primary duty of the federal judiciary to police the ethical standards of the bar. The trial court should intervene only where a given factual situation presents an ethical problem that might have an effect upon the litigagation before it or "taint" the trial. *E.g., Board of Education of the City of New York v. Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979); *W. T. Grant Company v. Haines,* 531 F.2d 671 (2d Cir. 1976). Even here, the question is a balancing one which must necessarily take into account the various competing interests of the client, the fairness of the trial and the public. *See, e.g., Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163 (8th Cir. 1978).

Thus, the issue of which Firestone seeks a third federal court review is not a special or important question of federal law or its application, but merely an inquiry into whether the actions of the District Court, in this particular case, represented an *abuse of discretion.* This scope of review in disqualification cases followed by the Eighth Circuit in this case and by the other circuits can be found in *Fred Weber, Inc. v. Shell Oil Company,* 566 F.2d 602 (8th Cir. 1977), where the court at page 605 stated as follows:

> We apply the scope of review in disqualification cases described in *Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975): "The district court bears the responsibility for the supervision of the members of its bar. [Citing authorities.] The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. [Citing authorities.]", 513 F.2d at 571.

In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation,* 518 F.2d 751 (2d Cir. 1975), and in *Allegaert v. Perot,* 565 F.2d 246, 251 (2d Cir. 1977), the courts indicate that great reliance is placed upon the district court's exercise of discretion. *See also, International Business Machines Corporation v. Levin,* 579 F.2d 271, 279 (3rd Cir. 1978), a case heavily relied upon by petitioner in its brief to the Eighth Circuit, and *Waters v. Western Company of North America,* 436 F.2d 1072, 1973 (10th Cir. 1971).

Such a rule was significant through the appeal of this case and is important even in considering Firestone's petition in light of the considerable speculative nature of Firestone's assertions and the factual dispute between the parties. While a recitation of facts is not appropriate for this brief, suffice it to say that in the Courts below (Fire-

stone's statements in its petition notwithstanding), the facts of this case were *not* "essentially" without dispute and the assertions in its petition are *not* "essentially" without contradiction. For example, the strongly worded yet unfounded and speculative assertions by Firestone as to collusive conduct of Risjord, which were rejected by the District Court, were most assuredly the subject of dispute. Similarly, the oft-repeated assertion by Firestone that Risjord had a "long-standing" relationship with Home Insurance Company and the implication that Risjord's now former representation of Home Insurance Company in a fire loss claim is somehow related to his present representation of plaintiffs in product liability claims against Firestone were also disputed. Those facts and arguments of record and their interpretation were known to the District Court judge and only he, much as a trier of fact, could separate truth from speculation. What Firestone is asking the Supreme Court to do is to review and overturn the District Court's resolution of an essentially factual issue, and the Court of Appeals' determination that that resolution was not the product of an abuse of discretion. That is not a part of the Court's certiorari functions. *See, Rudolph v. United States, supra* at 270.

It is because of this previous consideration by the Courts below that Firestone's complaints of an insensitivity to the situation at hand and of the failure to uphold public confidence in the courts are not well taken and do not justify certiorari. Both the District Court and the Court of Appeals had before them all of the facts and arguments asserted by Firestone plus others. Both the District Court and the Court of Appeals had before them the actual consents obtained by Risjord. The Court of Appeals had before it the ruling and reasoning of the District Court. The Court of Appeals, also, had before it a factor not apparent in the Petition of Fire-

stone, the fact that withdrawal by Risjord from his representation of Home had in fact taken place. Such consideration by these Courts must preclude invoking the jurisdiction of this Court.

Petitioner also seeks to premise review by this Court by attacking the application of DR 5-105(A) and (C). The obtaining of consents by the District Court does not represent an unusual or contrary approach which would merit review by this Court as urged by petitioner. Rather, the application by the District Court of Disciplinary Rule 5-105(A) and (C) and the action of the Court of Appeals in finding no abuse of discretion are consistent with the actions of other Courts in similar circumstances. *E.g., International Business Machines Corporation v. Levin, supra; In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83 (5th Cir. 1976); *Messing v. FDI, Inc.,* 439 F.Supp. 776 (D.N.J. 1977); *Acorn Printing Company v. Brown,* 385 S.W.2d 812, 817 (Spr. Mo. App. 1964). None of the cases cited by petitioner indicate that the action of the District Court in requiring consents violates any basic tenant of federal law.[3]

One final point should be emphasized. The interests of the four sets of plaintiffs, represented by Risjord for several years, in having the attorney of their choice, a choice confirmed by the consents filed in this action, must not be lightly disregarded. *See, Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163, 165 (8th

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3. At this point, it is tempting to urge the same arguments put forth before the District Court and the Court of Appeals as to the merits or lack thereof of the position of the respective parties. Such arguments, however, are not appropriate for a consideration of the exercise by this Court of its discretionary jurisdiction. Suffice it to say that substantial basis and authority were provided to the District Court and the Court of Appeals to sustain their respective actions and to reject any claim that the District Court's discretion was not properly exercised or that the state of the facts is such to merit disqualification of Risjord.

Cir. 1978), and *Central Milk Producers Cooperative v. Sentry Foods Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978). This is particularly so in view of the fact that Firestone has never been a client of Risjord, and, thus has no standing to attempt to disqualify him. *See, In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Payne v. St. Louis Grain Corporation*, 562 S.W.2d 102 (St. L. Mo. App. 1977). Further, the dilatory approach taken by Firestone in raising the conflict issue two years after having learned through its counsel of record of Mr. Risjord's representation of Home in the *Cannova* case but not until Risjord became lead and liaison counsel in these proceedings (Record 46) should be taken into account.

Some of the very considerations which caused the Eighth Circuit to change its position on appealability in light of the fact that the use of motions to disqualify had become "disguised harassment" (*Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979)) and "common tools of the litigation process, being used . . . for purely strategic purposes" (*Allegaert v. Perot, supra* at 251) are pertinent. They should provide an additional basis for denying certiorari herein. In light of what has occurred below, the interests of plaintiffs, who have suffered serious injuries, in retaining the attorney, whom they have chosen to represent them, and who has done so with considerable effort for a considerable period of time, should not be overlooked. Those interests militate strongly against a further delay of the prosecution of their personal injury actions against Firestone by granting the instant petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of the Firestone Tire & Rubber Company should be denied.

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IN THE

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THE FIRESTONE TIRE & RUBBER COMPANY,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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SUBJECT INDEX

	Page
The Appealability Issue in This Case Is a "Live" One Suitable for Adjudication	2
Respondent's Assertions as to the Alleged Frequency of Such Appeals Argues for, Not Against, Review by This Court	3
Respondent's Challenge to Firestone's Standing Is Frivolous	4
No Need to Resolve "Factual Disputes"	4
The Disqualification Proceedings Have Delayed the Action and Risjord's Suggestion of Harassment Is Unfounded	5
Home's Purported Discharge of Risjord in Cannova Does Not Aid Respondent's Position Here	6
A True Concern for Plaintiffs' Rights Dictates That Risjord Be Disqualified	6
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases	Page
Arkansas v. Dean Foods Products Company, Inc., 605 F.2d 380 (8th Cir. 1979)	2, 5
Cannova case	5, 6
Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973)	5
S. S. Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	3
Weber case	2
Statutes	
United States Code, Title 28, Sec. 1291	2
United States Constitution, Art. III	2

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Respondent's Brief in Opposition raises certain arguments which warrant a brief reply.[1]

---

[1]As in our petition we shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to Niewald, Risjord & Waldeck, the law firm of which he is a member, as the "Risjord firm"; to appellant The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs". Record references (designated "R., p. ..." or "Risjord Dep., p. ...") are to the Record in the Court of Appeals. Appendix references (designated "App. ..., p. ...") are to the appendices to the Petition.

The Appealability Issue in This Case Is a "Live" One Suitable for Adjudication.

Contrary to Respondent's assertions, the basic question posed by Firestone's Petition — *i.e.*, whether an order denying a motion to disqualify counsel is a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. §1291 under the "collateral order" doctrine — is indeed a "live" one in this case.

Certainly the Court of Appeals regarded it as such, as evidenced by the fact that it deemed the question worthy of *en banc* consideration.

Nor is there any real doubt that the Court of Appeals decided the question, in what that Court expressly describes (App. B, p. 9) as a "holding", as evidenced by the following language: "We have reconsidered *Weber* and *Dean Foods* and now agree with the position of the District of Columbia, Sixth and Ninth Circuits; it is the opinion of this court that *Weber* and *Dean Foods* should be and hereby are overruled." [Footnote omitted]

Consistent with the "case or controversy" requirement of Article III of the Constitution, the Court of Appeals' ruling of non-appealability (upon which it predicated the overruling of its prior cases) necessarily precluded it from giving meaningful consideration to the merits of the present case. Moreover, as a practical matter the court's determination of non-appealability necessarily foreclosed the court from reversing the trial court, for to do so would have undermined the appellate court's position in declining to entertain such appeals in the future. Nor is it conceivable that absent such considerations the appellate court would have disposed in so casual a fashion of substantive issues which the trial court itself found to be substantial and appeal-worthy. (App. A. p. 5; R. p. 292).

In short, the Court of Appeals' holding of non-appealability necessarily has had a profound impact upon the course of the action, depriving Firestone of any real "day in court" at the appellate level, and is therefore very much a "live" issue in the case. Conversely, review of the Court of Appeals' holding by this Court would in no way be "advisory".

Indeed, inasmuch as the Eighth Circuit, based on its holding in this case, now deems the matter a closed issue, unless review is granted here it is likely that this Court never will have a case from that Circuit in which to address the question.

Thus, Respondent's professed disinterest in the appealability issue appears to stem not from the issue's alleged lack of viability but from the fact that Respondent, having prevailed on the issue below and thereby effectively deprived Firestone of any meaningful appellate review, would like to see the matter put to rest.

Nor is the present case akin to that in *S. S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), cited by Respondent, where the Court's construction of a bill of lading disclosed that the case did not actually pose the question the Court had sought to review.

Respondent's Assertions as to the Alleged Frequency of Such Appeals Argues for, Not Against, Review by This Court.

Even if we accept; *arguendo,* Respondent's claim that there has been a "flood of appeals" from rulings on motions to disqualify, this actually argues for, not against, the review which Firestone seeks, inasmuch as it points up the importance of a definitive resolution of the issue of appealability — a resolution which can come only from this Court.

Nor does the present state of the authorities — in which a majority of the circuits addressing the question have opted for

appealability, while others have "backed and filled" on the question — support Respondent's suggestion that the Courts of Appeals are "resolving" the question.

Neither is it any answer for Respondent to suggest the possibility of review by extraordinary writ or other special procedures, for the adequacy or inadequacy of such procedures is the very question which has divided the circuits.

Respondent's Challenge to Firestone's Standing Is Frivolous.

Respondent challenges Firestone's "standing" — a point not even raised in the trial court nor relied on by the Court of Appeals. In light of Firestone's obvious interest in avoiding the dangers posed by permitting an attorney linked to its insurer Home to control the course of lawsuits in which Home is seeking to avoid coverage, this belated challenge appears frivolous.

No Need to Resolve "Factual Disputes".

Contrary to Respondent's assertion, the danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit — particularly in a context where the insurer is disclaiming coverage — does serve to "taint" the proceedings. Nor does this clearcut question give rise to the kinds of factual disputes to which Respondent refers (*e.g.*, whether the subject matters of the litigation are "related" — an extraneous question here — or whether collusion actually occurred). Indeed, the basic flaw in the trial court's approach stemmed not from a failure to find the conflict but from a failure to address the full implications of that finding or to take meaningful corrective action — a task for which this Court is equally well suited.

The Disqualification Proceedings Have Not Delayed the Action and Risjord's Suggestion of Harassment Is Unfounded.

While Respondent suggests that the disqualification proceedings have served to delay the prosecution of the case, actually Firestone has not sought to delay discovery pending the resolution of that question. Moreover, the trial court found that "an immediate appeal from [its] ruling may *materially advance* the ultimate termination of [the] litigation" (App. A, p. 5; R. p. 292). (Emphasis added).

The simplest answer to Risjord's claim that Firestone's motion to disqualify him is merely designed for harassment is that the trial court itself not only found Firestone's concerns to be well taken but took pains to endorse Firestone's present appeal and the substantiality of the question it poses. (App. A, p. 5; R. p. 292). Moreover, the uncontradicted facts of record attest to the legitimacy of Firestone's concerns.[2]

---

[2]Risjord's suggestion that Firestone was dilatory in raising the conflict issue — a point Risjord first urged on appeal — likewise is unfounded.

In essence, Risjord contends that Firestone should have known of Risjord's relationship to Home at the time he filed suit on behalf of the Risjord Plaintiffs because William Sanders (Firestone's liaison counsel in this multi-district litigation) had been engaged by Risjord's error and omissions insurer some years ago to defend Risjord against a libel charge asserted against Risjord in the *Cannova* suit (The libel claim was disposed of by summary judgment). (Risjord Dep., p. 104). There is no suggestion Mr. Sanders had been aware of the continuing and deep-rooted nature of the Home-Risjord relationship. Nor does Risjord suggest wherein Firestone could be charged with knowledge allegedly acquired by Mr. Sanders in another context. Moreover, the multi-faceted conflict in which Risjord was involved could not have become apparent prior to the time Home disavowed liability to Firestone on the intentional tort claims of the Risjord Plaintiffs. And Risjord's own delay in urging the point and his failure to demonstrate any prejudice militate against it in any event. Nor are laches claims lightly entertained in the present context, given the public interest considerations involved. See, *e.g.*, *Arkansas v. Dean Foods Products Company, Inc.*, 605 F.2d 380, 384 (8th Cir. 1979) (claim of laches rejected, court noting that "[disqualification is an ethical, not a legal matter [citing case] and is in the public's, as well as the client's, interest"]); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (three-year delay not fatal).

Home's Purported Discharge of Risjord in Cannova Does Not Aid Respondent's Position Here.

As for Home's purported discharge of Risjord in the *Cannova* case, since the Court of Appeals does not even mention that fact, let alone rely on it, we need not discuss it at length here. Risjord's purported divorcement from *Cannova* is by no means complete; Risjord remains as counsel for the other defendants in *Cannova*, in which role he is still in a position to serve Home's interests in that case (R. p. 437). Viewed in terms of an "appearance of impropriety", the "withdrawal" is more cosmetic than real. But even assuming, *arguendo*, that Risjord were totally divorced from *Cannova* (which is not the fact), that would not be a meaningful cure, since the relationship between Risjord and Home is deeply rooted and far transcends Risjord's involvement in *Cannova*. Nor would Risjord be unaware that his firm's potential future business with its longstanding client, Home, might well depend on the extent his actions tended to aid or hinder Home's efforts to defeat coverage on the claims of the Risjord Plaintiffs.

A True Concern for Plaintiffs' Rights Dictates That Risjord Be Disqualified.

Risjord's professed concern for plaintiffs' rights appears misplaced. For the danger that Risjord will guide the cases so as to further (or at the very least so as not to hinder) the efforts of his client Home to defeat coverage poses a threat not only to Firestone but also to the Risjord Plaintiffs, who are entitled to representation by counsel whose loyalty is not impaired by such considerations. Stated otherwise, what ought to concern this Court is not the fact that plaintiffs selected Risjord (and, being insufficiently sophisticated or informed to appreciate

the dangers, may have acquiesced in his retention), but the fact that Home, whose motives are hardly above suspicion, is demonstrably eager to have him in the case.

In short, the real dichotomy in these proceedings lies not between Firestone and plaintiffs, but between Risjord and Home on the one hand, and on the other hand Firestone, the plaintiffs, and the need to protect the public confidence in the judicial system. The choice between those interests cannot admit of serious doubt.

Conclusion.

Respondent's Brief fails to negate the need for certiorari and accordingly Petitioner again urges that certiorari be granted as prayed.

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vs.

JOHN C. RISJORD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

Questions Presented.

1. Is an order denying a motion to disqualify counsel a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. §1291 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (See Point I, *infra*).

2. In sanctioning the simultaneous representation by attorney Risjord of both the plaintiffs and the insurer of defendant Firestone, over Firestone's objections, did the court below err by permitting a patent and potentially recurring form of conflict, requiring corrective action by the exercise of this Court's supervisory jurisdiction? (See Point II, *infra*).

TABLE OF CONTENTS

Page

Questions Presented i
Opinions Below 1
Jurisdiction 1
Statute Involved 2
Statement of the Case 2
Summary of Argument 6
Argument 12

I.

An Order Denying a Motion to Disqualify Counsel Qualifies for Appeal Under the Collateral Order Doctrine 12

Introductory 12

A. An Order Denying a Motion to Disqualify Counsel Satisfies the Cohen Criteria for Finality ... 13

B. Appealability of Orders Denying Disqualification Is Consistent With Sound Judicial Policy 21

1. Professed Fears That Appealability Will Lead to Inundation of the Courts of Appeals Have Proven Groundless 21

2. Appealability Will Tend to Further, Not Frustrate, the Interests of Efficient Judicial Administration 26

C. The Rationale of Armstrong v. McAlpin Is Unsound 27

Page

II.

The Conflict Disclosed by the Present Record Requires That Attorney Risjord Be Disqualified 33

A. The "Consent" Approach Adopted Below Was Inherently Unsound 33

B. The Purported "Consents" Filed by Risjord Could Not Obviate the Need for Disqualification in Any Event 40

C. Home's Efforts to Preserve Risjord's Status as Counsel for Plaintiffs Reinforce the Concerns Inherent in the Basic Conflict 43

Conclusion 45

Addendum A. Illustrative "Card" of Risjord Firm in Martindale-Hubbell Law Directory (A. 100) 1

TABLE OF AUTHORITIES

Cases — Page

Abney v. United States, 431 U.S. 651 (1977) 14, 19, 27, 28, 32

Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) 23

Arkansas v. Dean Foods Products Co., Inc., 605 F.2d 380 (8th Cir. 1979) 5, 6, 13

Armstrong v. McAlpin, ... F.2d .... (2d Cir. No. 79-7042, June 1980) ..... 12, 19, 22, 23 ..... 24, 27, 28, 29, 30, 31, 32, 33

Board of Education of the City of New York v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) 24

Bohack Corp. v. Gulf & Western Industries, Inc., 607 F.2d 258 (2d Cir. 1979) 23

Central Milk Products Cooperative v. Sentry Food Stores, Inc., 573 F.2d 988 (8th Cir. 1978) 5, 13

Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975) 23

Church of Scientology of California v. McLean, 615 F.2d 691 (5th Cir. 1980) 27

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) 4, 23, 36, 41

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) ..... i, 6, 7, 12, 13 ..... 17, 18, 19, 21, 27, 28, 30, 31, 45

Community Broadcasting of Boston, Inc. v. Federal Communications Commission, 546 F.2d 1022 (D. Col. Cir. 1976) 12, 16, 17, 26, 29

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 14, 30

Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), clarified, 370 F.2d 481 (9th Cir. 1966) 12, 16, 17

Desist v. United States, 394 U.S. 244 (1969) 6

Page

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 14, 19, 28

Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977) 5, 12

Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975) .. 12, 26

Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977) 23

General Electric Co. v. The Valeran Corp., 608 F.2d 265 (6th Cir. 1979) 14

General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) 23

Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978) 23

Greene v. Singer Co., 509 F.2d 750 (3d Cir. 1971) 15, 16, 17

Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir. 1956) 28

Hartford Textile Corp., 588 F.2d 872 (2d Cir. 1978) .. 23

Holloway v. Arkansas, 435 U.S. 475 (1978) 18, 38

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) 23

I.B.M. Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978) 3, 4, 34, 41

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975) 24

J.P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975) 23

Kelly, Matter of v. Greason, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) 10, 36

Kroungold v. Triester, 521 F.2d 763 (3d Cir. 1975) ... 12

Page

LeFraks v. Arabian American Oil Co., 527 F.2d 1136 (2d Cir. 1975) 23
MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395 (4th Cir. 1977) 12
Mathews v. Eldridge, 424 U.S. 319 (1976) 17
Meat Price Investigators Association v. Spencer Foods, Inc., 572 F.2d 163 (8th Cir. 1978) 5, 12, 13
Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) 12
Meyerhoffer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974) 24
NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) 23
Sapienza v. New York News, Inc., 481 F.Supp. 676 (S.D.N.Y. 1979) 36
Securities and Exchange Commission v. Sloan, 535 F.2d 679 (2d Cir. 1976) 23
Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) ... 21, 22, 23, 28
Stack v. Boyle, 342 U.S. 1 (1951) 19
Stovall v. Denno, 388 U.S. 293 (1967) 6
Taylor, In re, 567 F.2d 1183 (2d Cir. 1977) 24
Tomerlin v. Canadian Indemnity Co., 61 Cal.2d 638, 39 Cal.Rptr. 731, 394 P.2d 571 (1964) 38
Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961) 16
Trone v. Smith, 553 F.2d 1207 (9th Cir. 1977) 17
United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) 24
United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979) 23

Page

Uniweld Products, Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967) 12

Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) 12

White Motor Corp. v. White Consolidated Industries, Inc., 60 Ohio App.2d 82, 395 N.E.2d 1340 (1978) 16, 26

Will v. United States, 389 U.S. 90 (1967)..... 18

Williams v. Reed, 3 Mason 405, 418 Fed. Cas. No. 17,733 (C.C. Maine 1824) 34

W. T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976) 23

Young, Matter of, 188 App.Div. 538, 177 N.Y.S. 259 36

Rules

Federal Rules of Appellate Procedure, Rule 38 27

Statutes

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 28, Sec. 1291 ..... i, 2, 12, 13, 16, 18, 21, 28, 32

United States Code, Title 28, Sec. 1292(b) 7, 17, 18, 32

United States Code, Title 28, Sec. 1332(a) 2

United States Code, Title 28, Sec. 1651 .....7, 17

United States Code, Title 28, Sec. 1912 27

United States Code, Title 28, Sec. 1927 27

United States Constitution, Art. III 7

Textbooks

Canons of the American Bar Association Code, Canon 5 35

Page

Canons of the American Bar Association Code, Canon 9 35

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105 ..10, 34, 35, 37

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(A) 35

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(B) 35

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(C) ..... 35, 36 ..... 37, 40, 41

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105 (D) 3

Comment: The Insurer's Duty to Defend Under a Liability Insurance Policy, 114 Univ. Pa.L.Rev., pp. 734, 736 (1966) 38

1 and 2 Federal Local Court Rules (Pike & Fischer, Inc., ed., Callaghan & Co. 1979) passim 20

11 Georgia Law Review, pp. 705, 713-714 (1977) ... 29

Middle District of Alabama, Local Rule of Court Concerning Oath of Attorneys Upon Their Admission to Practice (Adopting Canons of the ABA and Code of Ethics of the Alabama State Bar Association), 1 Federal Local Rules at Ala., p. 2a 20

Moore, Federal Practice, Sec. 110.10 28

Northern District of Illinois, Local Rules 6(a)(i) and 8(3), 1 Federal Local Rules at Ill., pp. 54-55 20

Note, 30 Vand.L.Rev., pp. 259, 271-272, 273 (1977) 19, 29

45 University of Chicago Law Review, pp. 450, 471-472 (1978) 29, 32

Wright, Miller, Cooper, Federal Practice and Procedure, Sec. 3911, pp. 499, 500 (1976) 17, 18, 28

Opinions Below.

The "opinion" of United States District Judge William R. Colinson (Western District of Missouri) on Firestone's Motion to Disqualify Attorney John C. Risjord and the Risjord firm (being a portion of the Second Pretrial Order)[1] is unreported and appears at page A. 157 of the Appendix. The opinion of the Court of Appeals is reported at 612 F.2d 377 and reproduced at page A. 200 of the Appendix. The judgment as entered showing the date of entry appears at page A. 204 of the Appendix.[2]

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 7, 1980 (A. 204). The petition for a writ of certiorari was filed on March 13, 1980; certiorari was granted on May 12, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]The order in question was included as a discrete order in the United States District Court's Second Pretrial Order (A. 157 at A. 165).

[2]We shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to Niewald, Risjord & Waldeck, the law firm of which he is a member, as the "Risjord firm"; to appellant The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs". Appendix references (designated A. . . .) are to the pages of the printed single Appendix.

The Court (by its order of June 23, 1980) has granted leave to supplement the record but no page references to the additional materials (annexed to Risjord's Motion of June 9, 1980) are presently available; hence, such matters (cited only at page 4, note 7 of this Brief) are merely designated Supp. Record.

Statute Involved.

United States Code, Title 28 §1291.

> "*Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Statement of the Case.

This proceeding involves a motion to disqualify counsel arising in the context of multi-district proceedings. Jurisdiction of the court of first instance (the United States District Court for the Western District of Missouri) in the multi-district proceedings ultimately rests on diversity grounds. 28 U.S.C. §1332(a).

John C. Risjord and the Risjord firm are attorneys for certain plaintiffs (the Risjord Plaintiffs)[3] who have sued Firestone, seeking damages for personal injuries[4] (A. 12,

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[3]The Risjord Plaintiffs to whom reference is made are: Joe Willie Butler (*Butler* case); Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin, Kathy Diane Goodwin, and their mother Edna Goodwin Perkins (*Goodwin* case); and Rene, Luciano and Delphina Rodriguez (*Rodriguez* case) (A. 12, 50, 62). Risjord also represents the plaintiffs in a fourth rim case (*Hale*), arising out of an occurrence in October, 1977, as to which Home does not afford coverage (A. 28). Because of the obvious interrelationship of the four Risjord cases (the complaints generally follow the same format), Risjord's actions in *Hale* must inevitably be colored by his approach in *Butler*, *Goodwin*, and *Rodriguez*. Accordingly, Firestone believes that in order to avoid the appearance of impropriety Risjord should be disqualified in *Hale* as well, even apart from the possibility that Risjord's strategy in *Hale* might itself be motivated by a desire to aid Home's position in other cases.

[4]The suits of the Risjord Plaintiffs are part of multi/district litigation involving a number of personal injury actions which have been brought against various manufacturers of multi-piece rims or components thereof, including Firestone. Risjord serves as lead and liaison counsel for all of the plaintiffs in the multi-district litigation (A. 81).

50, 62). Risjord and the Risjord firm also have a long-standing relationship as attorneys for The Home Insurance Company, which insures Firestone against the claims of the Risjord Plaintiffs (A. 111, 134, 157-158). The Risjord-Home relationship extends over a period of some twenty years, during which Risjord and the Risjord firm have represented Home in a number of matters[5] and consistently held Home out to the public as their foremost insurance client[6] (A. 90-91, 98-99, 100-102, 105-106).[7]

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[5]In his deposition, Risjord at one point testified as follows:

> "Q How long has your firm represented the Home Insurance Company?
>
> "A The Home Insurance Company, my understanding, was a fire insurance company. We represented the Home Insurance Company—Fire Insurance Company—periodically, probably as long as I have practiced law." (A. 90-91).

The trial court found that Home employed the Risjord firm "from time to time on a case-by-case basis." (A. 157-158).

The Risjord Firm's representation of Home is, of course, imputed to Risjord. See Disciplinary Rule (DR) 5-105(D):

> "If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment."

[6]During the 20 years Home has been a client of the Risjord Firm, Home consistently has been listed *first* among the Risjord Firm's insurance clients (in a non-alphabetical listing) in the Martindale-Hubbell Law Directory (A. 90, 100-102, 105-106). The entry (A. 100-102) printed as Addendum A to this Brief (following page 45) is illustrative. Risjord claimed he had suggested that the list be alphabetized. But he acknowledged that he had received proofs of the list (A. 96) and being aware that a non-alphabetical listing was employed, apparently did not seek to alter Home's preeminent position in that list.

[7]At the time of the trial court's order denying Firestone's motion to disqualify, Risjord and his firm were counsel of record for Home in one such case (involving a first party claim under a policy of fire insurance) entitled *Cannova Enterprises, Inc. etc. v. Home Insurance Company, et al.*, then pending in the Western District of Missouri (A. 98). Pending Firestone's appeal, Home purported to discharge Risjord in *Cannova* (A. 190). Since the Court of Appeals does not even mention that fact, let alone rely on it, we need not discuss it at length here. For present purposes, we merely note that in light of the deeply rooted relationship between Risjord and Home, the mere disposition of a single case (*i.e., Cannova*) cannot be viewed as a matter of great moment. See *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978). Nor would Risjord be unaware that his firm's potential future business with

(footnote continued on following page)

In framing his complaints against Firestone, Risjord included a highly unusual theory of "intentional tort", whereupon his client Home served "reservation of rights" letters upon Firestone, disclaiming coverage for such "intentional tort" claims under its liability Policy (A. 12, 50, 62, 113, 115).[8]

Firestone thereupon moved to disqualify Risjord[9] and the Risjord firm, citing the conflict posed by Risjord's *simultaneous* relationship[10] to both Home and the Risjord Plain-

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its longstanding client, Home, might well depend on the extent his actions tended to aid or hinder Home's efforts to defeat coverage vis-a-vis Firestone.

Risjord now advises that the *Cannova* case has been dismissed (Supp. Record). But that dismissal likewise is not a matter of great moment here, given the real gravamen of the conflict complained of.

Nor may Risjord properly take comfort from his recent self-serving disclaimer (Supp. Record) as to other pending cases. That disclaimer (even if true) is fully consistent with an ongoing relationship between Risjord and Home, having in mind Risjord's testimony that his firm has represented Home periodically over a twenty-year span and that a brief gap in specific assignments (conveniently coinciding with the pending disqualification proceedings) does not really negate the impact of the overall Home-Risjord relationship. See *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978).

[8]The role of Risjord in espousing an "intentional tort" theory is demonstrated in the *Rodriguez* case, in which the original Complaint (filed by counsel other than Risjord) did not proceed on an intentional tort theory, whereas the Second Amended Complaint (filed by Risjord) does proceed on such a theory (A. 6, 12), in light of which Home has served a disclaimer in that case also (A. 197, 198).

[9]Firestone sought to disqualify Risjord and the Risjord firm from further representing plaintiffs (*e.g.*, the Risjord Plaintiffs) in multi-piece rim cases against Firestone in which Home insures Firestone. Firestone likewise sought to disqualify Risjord and his firm in rim cases in which information obtained from Home could be useful to plaintiffs. (A. 104).

[10]Where, as here, the attorney's dual role is current and simultaneous, the focal point is the duty of undivided loyalty and need for independent judgment, as opposed to the question of preserving confidences (and related issue of subject matter nexus) which is stressed where a former client is involved. See, *e.g.*, *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976); *I.B.M. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978).

tiffs (A. 104). In essence, Firestone contended that the temptation which Risjord inevitably confronts to further the interests of his valued, long-standing client Home, in developing a strategy against Firestone, creates an inherently improper situation, not only in the context of Home's fiduciary obligation to its insured but also in terms of Risjord's duty of loyalty (and independent judgment) to the Risjord Plaintiffs, who should and must be represented by counsel untainted by the differing interests of another client.

The trial court, while finding that Risjord's position was likely to have an adverse effect on the exercise of his independent judgment[11], nevertheless authorized Risjord to continue despite Firestone's objection provided he secured the consent of Home and the Risjord Plaintiffs[12], which consents Risjord purported to obtain (A. 160, 165-166, 167).

Firestone thereupon appealed (A. 184) relying upon the Eighth Circuit's recent holding in *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977) expressly authorizing an appeal from an order denying disqualification, and upon several other recent cases in which the Eighth Circuit had permitted such appeals. (See, *e.g.*, *Meat Price Investigators Association v. Spencer Foods, Inc.*, 572 F.2d 163, 164-165 (8th Cir. 1978); *Central Milk Products Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 990 (8th Cir. 1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380

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[11]The trial court stated: ". . . this Court, like the court in *IBM v. Levin, supra* 'think[s] . . . that it *is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result* from the adversary posture towards that client in another legal matter.' *IBM v. Levin, supra* at 280." (Emphasis added). (A. 160).

[12]Absent such consent, Risjord was directed to terminate his representation of either Home "or the plaintiffs in any suit against Firestone." (A. 165-166).

(8th Cir. 1979).) Without even setting the matter for oral argument, the appellate court, *en banc*, rendered an opinion in which it overruled this entire line of cases, and held that such orders were not appealable (A. 201-202).

After devoting its primary attention to that question, the Court of Appeals, almost by way of a footnote, acknowledged that it should consider the merits of the case before it. Without any meaningful discussion of the facts or the law, the appellate court (devoting but a single sentence to the matter) purported to uphold the trial court's action as not involving an abuse of discretion (A. 203).[13]

Summary of Argument.

I.

Orders denying disqualification generally, and certainly the order denying Firestone's motion in the instant proceedings, should be deemed appealable under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Nor is there any valid reason for distinguishing such orders from those granting disqualification, the appealability of which appears to be generally conceded. Although the circuits are divided on

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[13]Consistent with the "case or controversy" requirement of Article III of the Constitution, the Court of Appeals' ruling of non-appealability (upon which it predicated the overruling of its prior cases) necessarily precluded it from giving meaningful consideration to the merits of the present case. See, *e.g.*, *Desist v. United States*, 394 U.S. 244, 254-255 note 24 (1969); *Stovall v. Denno*, 388 U.S. 293, 301 (1967). Moreover, as a practical matter the court's determination of non-appealability necessarily foreclosed the court from reversing the trial court, for to do so would have undermined the appellate court's position in declining to entertain such appeals in the future. Nor is it conceivable that absent such considerations the appellate court would have disposed in so casual a fashion of substantive issues which the trial court itself found to be substantial and appeal-worthy (A. 160, 166).

the question, upon analysis the view here urged is consistent with the *Cohen* criteria and with the dictates of logic and sound policy.

Certainly the *Cohen* elements of separability and finality are satisfied here. So, too, is the urgency factor cited in *Cohen*. And insofar as the importance of the order may be a relevant consideration, that factor likewise militates in favor of appealability.

Viewing the question of appealability in terms of urgency, there are compelling reasons for permitting immediate review rather than deferring review until an appeal is taken from the ultimate judgment on the merits. Apart from the obvious waste in expending time and effort on proceedings which were tainted from the outset, there are subtler but no less serious irreparable injuries to be considered in the context of the underlying conflicts which give rise to such proceedings. Thus the course of the proceeding may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty. Likewise irreparable will be the effect of such a tainted proceeding in frustrating public policy and in its impact upon the public's perception of the administration of justice. Nor is it a real answer to these concerns to suggest that the aggrieved party resort to the vagaries of the All-Writs Statute (28 U.S.C. §1651) or the uncertain prospects of a possible permissive appeal under 28 U.S.C. §1292(b). Indeed, the continued vitality of *Cohen* itself attests to this Court's recognition that the parties ought not to be relegated to such dubious alternatives where the *Cohen* rationale comes into play. Finally, deferral of appeal to final judgment on the merits would not really aid the appellate court in determining the extent to which the taint complained of has affected the proceedings, as that impact cannot readily be quantified at any stage of the proceedings.

Turning to the question of "importance," and consistent with the pragmatism which the subject doctrine properly requires, while an order may be deemed important because its making resolves a question of broad impact, one also may view a given class of orders as important because of their impact upon the losing parties, or because they are addressed to questions rooted in same significant public policy, or on both accounts. The order here in question qualifies as important by all of these standards. The precise issue posed—*i.e.*, the need to apply a disciplinary rule in widespread use throughout the Federal judiciary in such a manner as to obviate the everpresent danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit—clearly satisfies the first test. But beyond this, we submit that orders denying disqualification generally are important both in terms of their impact upon the losing party and because of the serious questions of public policy which they raise—questions which go to the very heart of the administration of justice, and of the public's perception of the process by which justice is administered.

While there are thus cogent reasons for treating the order in question as appealable, the concerns sometimes cited as supporting a contrary view will not bear analysis.

First of all, when measured in terms of relevant statistics (as opposed to untested assumptions), professed fears that appealability will subject the courts to a flood of appeals, generally unmeritorious, prove to be groundless. A notable example is the Second Circuit, where the misgivings cited by the majority of a divided court which recently opted for nonappealability do not appear to be supported by the available data. Thus, the actual number of appeals in that Circuit from orders denying disqualification appears far from overwhelming, while the respectable number of reversals tends

to negate any assumption that such appeals are particularly prone to be groundless. Moreover, to the extent data for comparison is available, the percentage of affirmances of orders denying and granting disqualification is by no means grossly dissimilar.

Equally groundless is the argument that to permit appeals from orders denying disqualification necessarily tends to delay the proceedings unduly. Actually, it cannot be assumed that the progress of the case will in fact be impeded by such an appeal. For example, in the present case, there has been no attempt to foreclose discovery pending a resolution of the disqualification issue. Nor would the mere taking of an appeal serve to stay proceedings in any event—a factor in itself likely to dissuade use of such appeals for purely dilatory purposes. And as the Court aptly noted in *Abney v. United States,* 431 U.S. 651, 663 (n.8) (1977), any problems of delay can be obviated by rules or policies affording expedited treatment, and use of summary procedures where appropriate.

Indeed, the trial court here found that "an immediate appeal from [its] ruling may *materially advance* the ultimate termination of [the] litigation". (Emphasis added) (A. 160).

II.

Turning to the merits of the appeal, it is clear that the conflict disclosed by the present record requires that attorney Risjord be disqualified, and that the "consent" approach adopted below was inherently unsound.

In essence, the record reflects (essentially without contradiction) that attorney John Risjord and his firm, who represent the plaintiffs in certain product liability (wheel and rim) cases against Firestone, also have a long-standing relationship as attorneys for Firestone's product liability insurer (The Home Insurance Company), which has disclaimed coverage of those claims under its policy on the basis of an "intentional tort" theory espoused by Risjord. The conflict inherent in Risjord's position clearly is detrimental both to Firestone and to the plaintiffs to whom Ris-

jord owed a duty of individed loyalty, inasmuch as Risjord's management of the cases inevitably would be colored (consciously or unconsciously) by his awareness of Home's interest (as insurer of those very claims) in defeating coverage.

Notwithstanding the conflict of interests inherent in Risjord's position and the trial court's own finding that that conflict was likely to adversely affect Risjord's exercise of his independent judgment, the trial court held that Risjord might remain in the cases, notwithstanding Firestone's vehement objection, provided he obtained the consent of Home (which stood to benefit by the very conflict complained of) and the Risjord Plaintiffs (who were hardly of sufficient sophistication to appreciate the conflict).

In so holding, the trial court has misapplied a carefully drawn "consent" exception in the governing disciplinary rule (DR5-105), which rule generally precludes an attorney from accepting or continuing employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client". Clearly the "consent" exception in question is not designed to sanction "such delicate conflicting relationships and inescapable divided loyalties" as are here present (see *Matter of Kelly v. Greason*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968)), which inevitably preclude Risjord from exercising the independence of judgment which an attorney's duty of undivided loyalty demands. Even if Risjord's "intentional tort" theory were not consciously conceived with Home's interests in mind, in determining whether and to what extent to pursue it, his judgment must inevitably be clouded by his awareness that such a theory is helpful (and its abandonment harmful) to his client Home.

Nor could a "consent" approach be viable here in any event unless it provided for the consent of *all* affected par-

ties, including Firestone. Certainly it is unrealistic to look solely to Home in this regard, having in mind the risk that Home, notwithstanding its fiduciary duty not to take or permit any action respecting the conflict or its resolution which is or may appear to be detrimental to Firestone's interests, might choose to gamble on the conflict in the hope of benefiting at Firestone's expense. Indeed, Home's very willingness to consent to Risjord's dual role would itself be indicative of potential collusion, or at least that Home expected Risjord to be influenced by Home's interests.

Finally, the impracticability of a consent approach is pointed up by the manifest deficiencies in the "consents" Risjord purported to obtain.

In short, the temptation which Risjord inevitably confronts to cooperate and act in concert with his valued, long-standing client Home, in developing a strategy against Firestone, creates an inherently improper situation which can be remedied only by his disqualification.

ARGUMENT.

I.

AN ORDER DENYING A MOTION TO DISQUALIFY COUNSEL QUALIFIES FOR APPEAL UNDER THE COLLATERAL ORDER DOCTRINE.

Introductory.

There is a sharp division among the circuits as to the appealability of an order denying disqualification.

Half the circuits which have addressed the question have concluded that an order denying a motion to disqualify is appealable under 28 U.S.C. §1291 as a final (collateral) order, pursuant to the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Kroungold v. Triester*, 521 F.2d 763, 765 (3d Cir. 1975); *MacKethan v. Peat, Marwick, Mitchell & Co.*, 557 F.2d 395, 396 (4th Cir. 1977); *Uniweld Products, Inc. v. Union Carbide Corp.*, 385 F.2d 992, 994 (5th Cir. 1967); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1313 (7th Cir. 1978); *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975).

Half the circuits (including the court below) have concluded that such an order is not so appealable. See *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No.79-7042, June 1980) (en banc); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (D.C.Cir. 1976).

In the present case, the Court of Appeals for the Eighth Circuit, sitting *en banc*, overturned its own recent precedents (see, *e.g.*, *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977); *Meat Price Investigators Asso-*

ciation v. Spencer Foods, Inc., 572 F.2d 163, 164-65 (8th Cir. 1978); *Central Milk Products Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 1990 (8th Cir. 1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979))[14] and held that henceforth no such right of appeal will be recognized.

In the present portion of this Brief, we shall endeavor to demonstrate that the view favoring appealability is correct, both in terms of a proper application of the governing criteria laid down in *Cohen* (Point IA) and in terms of sound judicial policy. (Point IB).

A. An Order Denying a Motion to Disqualify Counsel Satisfies the Cohen Criteria for Finality.

In the seminal case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)[15], the Court recognizes that certain orders, collateral to the main action, should be deemed "final decisions" so as to qualify for appeal pursuant to 28 U.S.C. §1291.[16]

The Court in *Cohen* describes such appealable collateral orders as:

> "[Decisions] . . . which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated . . ." 337 U.S. at 546.

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[14]*Fred Weber* and *Dean Foods* were overruled expressly, the others by implication.

[15]*Cohen* involved an order denying a motion for security in a shareholder's derivative action.

[16]28 U.S.C. §1291 provides generally for appeals to the courts of appeals from "final decisions" of district courts.

While this Court properly has cautioned against overly rigid use of pat verbal formulae in this area (see *Eisen v. Carlisle & Jacquelin*, 417 U.S.156, 170 (1974)), the Court generally has stressed three elements as essential to appealability: (1) that the order be a conclusive determination of the question; (2) that the order involve a collateral matter rather than a mere step toward deciding the merits; and (3) that the order involve an important right which would be lost, probably irreparably, if appeal were deferred until there had been a final judgment on the merits. See *Abney v. United States*, 431 U.S. 651 (1977). Either in addition to or in conjunction with the foregoing elements, it has sometimes been suggested that account be taken of the importance of the order appealed from. See, *e.g.*, *Abney v. United States*, 431 U.S. 651 at 658 (1977) (order involving "an important right").

Clearly, the first two elements (*i.e.*, finality and separability) are satisfied as to orders denying disqualification. A degree of support for this view is at least implicit even in the decisions of those circuits which treat orders *denying* disqualification as non-appealable, insofar as those same circuits nevertheless treat orders *granting* disqualification as appealable. See., *e.g.*, the opinion of the Eighth Circuit in the present case (A. 202; 612 F.2d at 378). See also *General Electric Co. v. The Valeran Corp.*, 608 F.2d 265 (6th Cir. 1979). For example, it is difficult to conceive how disqualification proceedings can be viewed as "collateral" to the main action if the motion is granted yet fail to be so regarded if the motion is denied.

Turning next to the element of "urgency", the question arises: Is it practicable to defer review of a denial of disqualification until an appeal is taken from the judgment on

the merits? We believe there are cogent reasons for answering that question in the negative.

First of all, assuming (as we must for this purpose) that the challenge is well taken,[17] to proceed to judgment will have resulted in serious and irreparable harm which an ultimate reversal cannot fully vindicate. Beyond the obvious example of a needless expenditure of time and effort on proceedings which were tainted from the outset, there are additional aspects of irreparable injury which are even more germane in the present context.

One is the potential for incurable harm which may result from the underlying conflict—*e.g.*, the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty. As the court explains in *Greene v. Singer Co.*, 509 F.2d 750, 751 (3d Cir. 1971):

> "To require appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification may, for practical purposes, deny it the reality of appellate processes. The precise question is whether the prohibitions imposed by the court order are sufficient to protect the interests of the defendant during the course of the trial. If, upon post-trial review, it were held that the safeguards imposed by this district court were too fragile to protect threatened interests, there could be damage inflicted upon the litigant for which the law would provide no practical remedy. Conversely, if the appeal goes forward now,

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[17]As appears from the statistics at page 23, that assumption is by no means unrealistic.

prior to trial, the possibility of irreparable injury would be substantially lessened."[18]

Equally irreparable will be the effect of such a tainted proceeding in frustrating public policy and in its impact upon the public's perception of the administration of justice. See *Tomlinson v. Florida Iron & Metal, Inc.*, 291 F.2d 333, 334 (5th Cir. 1961) (court, in reversing denial of disqualification, observes: ". . . Here, if the order was in error, the harm resulting therefrom is in the nature of the frustration of a public policy which cannot be avoided or mitigated by any appeal taken after the trial, with Davis participating, is finally ended . . ."); See also *White Motor Corp. v. White Consolidated Industries, Inc.*, 60 Ohio App.2d 82, 395 N.E.2d 1340 (1978) (in holding an order denying disqualification appealable under state law,[19] court observes that construction in favor of appealability ". . . promotes the efficient administration of justice and serves the public policy embodied in the Canons of Ethics." 395 N.E.2d at 1345-1346).

Nor is it a real answer to these concerns to suggest (as does the court in *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022

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[18]This danger has been acknowledged by at least one court adhering to the view of non-appealability. See *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964) (clarified at 370 F.2d 418 (1966)) where the court, in granting a writ notwithstanding the court's view that an order denying disqualification was not appealable, observes: ". . . Continued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation . . ." 338 F.2d 516 at 521-522.

[19]Admittedly the state law in question was dissimilar from 28 U.S.C. §1291, but the policy considerations noted appear relevant here.

(D.Col.Cir. 1976)[20]) that the aggrieved party resort to the vagaries of the All-Writs Statute (28 U.S.C. §1651) or the uncertain prospects of a possible permissive appeal under 28 U.S.C. §1292(b).[21] The continued vitality of the *Cohen* doctrine itself[22] bears witness to this Court's refusal to relegate the parties to such dubious alternatives where the *Cohen* rationale is satisfied. And neither of the suggested "alternatives" appears suited to the collateral order context. Thus the very fact that the order in question relates to a collateral matter (essential under *Cohen*) might lead the trial

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[20]The potentially illusory character of supposed alternative remedies in this context is illustrated by *Community Broadcasting* itself, where the appellate court refused even to consider them, explaining:

"We do not now consider Community's entitlement to relief under the alternative procedures proposed. No provision exists for certification of agency orders, and Community has emphatically advised the court that it does not seek a writ of mandamus. Moreover, the papers submitted to the court do not present sufficient factual material to enable us to determine whether to issue a writ of mandamus." 546 F.2d 1022 at 1028, note 40.

[21]Those uncertainties are illustrated in the meanderings of the Ninth Circuit. See, *e.g.*, *Trone v. Smith*, 553 F.2d 1207 (9th Cir. 1977), where the court holds that despite implications to the contrary in *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964) (clarified at 370 F.2d 418 (1966)), 28 U.S.C. §1292(b) is not a proper avenue for review of an order denying disqualification. See also *Greene v. Singer Co.*, 509 F.2d 750 (3d Cir. 1971) (appeal on collateral order theory accepted after appellate court previously had denied leave to appeal pursuant to §1292(b)).

[22]The *Cohen* doctrine has been described as manifesting a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . ." *Mathews v. Eldridge*, 424 U.S. 319, 331 (note 11) (1976). Insofar as the challenge to appealability here may really be directed to that "core principle", the following observation in Wright, Miller, Cooper, *Federal Practice and Procedure:* Jurisdiction §3911 (1976), at p. 500, seems apropos:

"There is no indication that proper collateral appeals have swamped the appellate courts, required duplicitous appellate review, or stultified the district courts. Neither is there any indication that improper attempts at collateral order appeal have proved a substantial burden. . . . Absent a sharp change in the course of events, the collateral order doctrine deserves to continue in substantially its present form . . ."

court to conclude that an appeal from it would not "materially advance the ultimate termination of the litigation". Nor would such orders necessarily be viewed as involving "a controlling question of law".[23] And consistent with the restrictions placed upon review by extraordinary writ (see, *e.g., Will v. United States*, 389 U.S. 90, 95 (1967) ("only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of [mandamus]")) it, too, is unsuited as a replacement for collateral order review. See Wright, Miller, Cooper, *Federal Practice and Procedure:* Jurisdiction §3911 (1976) at pp. 499, 500. And if the writ "remedy" is to be made palatable by expanding the permissible scope of mandamus, the "cure" is likely to pose many more problems than it solves, in that it would set the courts adrift without the *Cohen* guidelines. Beyond this, the suggestion of "alternatives" to §1291 tends to "put the cart before the horse", for if the finality test of §1291 is met, there is no occasion to consider such alternatives.

Moreover, deferral of appeal to final judgment on the merits cannot validly be justified on the theory that the appellate court can then assess the precise impact of any error in denying disqualification. As a practical matter, the extent to which the taint complained of has affected the proceedings is likely to be immeasurable. Cf. *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (". . . to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."). And insofar as the real object of deferral

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[23]28 U.S.C. §1292(b) requires, *inter alia*, that the district court "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

may be to foreclose review by appealing to the natural tendency of the courts not to upset a case which has been fully tried, on the basis of intangibles the precise impact of which cannot readily be assessed, such an approach hardly can be viewed as affording the meaningful opportunity for review which the importance of the matter clearly warrants. See Note, 30 Vand.L.Rev. 259, 271-272 (1977): (''[I]t is unlikely that an objective determination of the ethical considerations will prevail on appeal from final judgment.'').

Turning next to the question of ''importance'', we believe it necessary to dispel at the outset the view sometimes voiced by the circuit courts that *Cohen* requires that the order appealed from be addressed to potentially decisive legal questions. See, *e.g.*, *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June 1980) (en banc). Recent definitive pronouncements by this Court lay down no such requirement. See, *e.g.*, *Abney v. United States*, 431 U.S. 651 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Nor has this Court refused to hold *Cohen* applicable merely because a class of orders may require resolution on a case-by-case basis. See *e.g.*, *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (challenge to bail as excessive). While a particular order may be deemed ''important'' because in making it the court is called upon to resolve a question of broad impact (see, *e.g.*, the *Cohen* case itself), one also may view a given class of orders as important simply because of their impact upon the losing party or because they are addressed to questions rooted in some significant public policy, or on both accounts. See, *e.g.*, *Abney v. United States*, 431 U.S. 651, 658 (1978) (''important right'').

As appears from the analysis at Point II of this Brief, the question posed by the motion for disqualification in the instant case—*i.e.*, the need to apply a disciplinary rule in

widespread use throughout the Federal judiciary[24] in such a manner as to obviate the everpresent danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit—would qualify as one of importance under the first standard. But we believe that the second standard (in both its aspects) is even more germane here, and that under it orders denying disqualification generally should be deemed important for this purpose.

That such an order has grave consequences for the losing party is amply illustrated by the present case, as is apparent from the analysis at Point II of this Brief. But the importance of such orders far transcends their impact on the immediate parties. The conflicts of interest which serve as the grist for motions to disqualify go to the very heart of the administration of justice, and of the public's perception of the process by which justice is administered, and reflect a vital need to preserve and strengthen public confidence in the Bar. So viewed, the rulings made on such motions are addressed to serious questions of public policy and as such hardly can be viewed as lacking in sufficient significance to warrant review. Indeed, it seems difficult to conceive of a rational system of justice under which rulings on motions for security are deemed deserving of immediate review, whereas a mo-

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[24]See 1 and 2 *Federal Local Court Rules* (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), *passim*.

See, *e.g.*, M.D. Ala., Local Rule of Court Concerning Oath of Attorneys Upon Their Admission to Practice (adopting Canons of the ABA and Code of Ethics of the Alabama State Bar Association), 1 *Federal Local Rules* at Ala., p. 2a; N.D. Ill., Local Rule 6(a)(i) (attorney for admission must certify that he has read the Canons of Ethics of the ABA and "will faithfully adhere thereto"; Local Rule 8(3) (discipline of attorneys who fail "to abide by the provisions of the Canons of Ethics of the American Bar Association"), 1 *Federal Local Rules* at Ill., pp. 54-55.

tion to disqualify counsel for a conflict of interests which threatens to taint the entire proceedings is regarded as unworthy of prompt attention.

B. Appealability of Orders Denying Disqualification Is Consistent With Sound Judicial Policy.

Consistent with the *Cohen* mandate that section 1291 be given a "practical rather than a technical construction" (337 U.S. at 546), we believe it appropriate to address additional policy considerations relevant to the question of appealability of orders of the type in question, by way of dispelling certain concerns which have been voiced in this area.

1. Professed Fears That Appealability Will Lead to Inundation of the Courts of Appeals Have Proven Groundless.

An argument sometimes urged in opposition to appealability of orders denying disqualification is that to permit such appeals would subject the courts of appeals to a flood of appellate litigation, generally unmeritorious. But the actual experience of the courts does not support this contention.

Initially, we invite the Court's attention to the following chart, tabulating all of the published opinions in the Second Circuit[25] involving appeals from orders granting or denying motions to disqualify counsel during the six-year period between that circuit's *en banc* adoption of a rule of appealability in *Silver Chrysler Plymouth, Inc. v. Chrysler*

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[25]The Second Circuit seems appropriate for this purpose inasmuch as its "experience" has been cited as typifying the supposedly horrendous consequences of appealability. See, *e.g.*, *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022, 1027 (D.Col.Cir. 1976), where the court states that ". . . the Second Circuit is now grappling with a deluge of interlocutory appeals . . ." and refers to a ". . . flood of interlocutory appeals . . ." in that circuit.

Motors Corp., 496 F.2d 800 (2d Cir.1974) and its recent *en banc* reversal of that rule in *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June, 1980).

Published Opinions In Second Circuit Between Silver Chrysler Plymouth (April 1974) and Armstrong (June 1980) Involving Appeals From Orders Granting or Denying Motions to Disqualify Counsel.

Orders Denying Disqualification[a]			Orders Granting Disqualification		
Number Affirmed	Number Reversed	Other Disposition	Number Affirmed	Number Reversed	Other Disposition
8[b]	3[c]	1[d]	5[e]	4[f]	1[g]

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[a] The present tabulation does not include *Lefraks v. Arabian American Oil Co.*, 527 F.2d 1136 (2d Cir. 1975), involving alleged improper solicitation of clients, a situation extraneous to the question with which we are concerned.

[b] *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June, 1980) (*en banc*).

In re Hartford Textile Corp., 588 F.2d 872, 876 (2d Cir. 1978).

Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977).

Securities and Exchange Commission v. Sloan, 535 F.2d 679 (2d Cir. 1976).

W. T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976).

Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975).

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975).

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

[c] *Bohack Corp. v. Gulf & Western Industries, Inc.*, 607 F.2d 258 (2d Cir. 1979).

Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

[d] *J. P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975) (remanded for further proceedings).

[e] *United States v. Ostrer*, 597 F.2d 337 (2d Cir. 1979).

Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978).

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975).

NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976).

[f] *Board of Education of the City of New York v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979).

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975). (*International Electronics* is included in both the "granted" and "denied" categories as it involved motions to disqualify both counsel.)

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

Meyerhoffer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974).

[g] *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977) (order reversed and remanded as premature).

* * *

The above figures are significant in several respects.

First, the actual number of appeals (involving published opinions) from orders denying disqualification (some 11 over a period of 6 years) is by no means overwhelming. See also dissenting opinion in *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June, 1980) (*en banc*) at page 2. Nor does it appear that the addition of dispositions not involving published opinions (for which no comprehensive data are readily available) would significantly alter the magnitude of these figures. Thus, in *Armstrong*, the court cites only three such appeals for 1978,[26] a figure which hardly suggest that the court is being deluged with such matters.

Secondly, a comparison of appeals from orders *denying* disqualification with appeals from orders *granting* disqualification (as to which the propriety of appeal is generally conceded) is particularly revealing. Thus the number of cases in each group (involving published opinions) is approximately the same, while the percentage of cases in which the lower court's determination was affirmed (*i.e.*, 67% where the trial court denied disqualification and 50% where the trial court granted disqualification) is not grossly dissimilar. And while the addition of appeals disposed of

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[26]According to the court, of the three cited appeals, one was withdrawn and in the other two the order below was affirmed. See *Armstrong*, p. 10, note 9.

without published opinions in the respective categories (for which the relevant statistics are not readily available) would, of course, alter the precise numbers,[27] there is no evidence that that addition would greatly alter the comparative results cited.

At the very least, the above figures tend to dispel any preconceived notion that appeals from orders denying disqualification may be presumed to be frivolous. They likewise argue against any rational distinction (in terms of appealability) between orders denying disqualification and those granting disqualification.[28] Apart from the illogic of that distinction, we submit it is inherently unfair, in that by affording meaningful redress only where disqualification is granted, it inevitably tilts the scales of justice in favor of the party opposing disqualification.

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[27]See page 24, note 26.

[28]The arguments sometimes advanced to support the distinction are readily answered:

1. While an order granting disqualification is said to disrupt the litigation, permitting an appeal from that order does not really obviate the supposed disruption. Nor is such disruption any less serious than the potential taint of the proceedings which may follow a denial of disqualification.

2. The improper granting of disqualification is said to sully the reputation of the affected counsel; but an improper denial sullies the administration of justice, hardly a matter of less moment. Indeed, it would be difficult to persuade the public of the merit of a legal system which is careful to afford prompt redress for injuries to attorney reputations but does not afford equally prompt relief for clients threatened with a breach of loyalty or breach of confidence.

3. Any contention that an improper denial of disqualification has no permanent effect ignores the considerations discussed above regarding the "urgency" factor.

4. The suggestion that the granting of the order is some evidence of merit represents a logical fallacy. The relative merit with which we are here concerned pertains to the *appeal*, not the *original motion*. Assuming, *arguendo*, the granting of the motion may indicate the *motion* was well taken, it does not support an inference that the *appeal* from that grant is well taken so as to support especially favorable treatment for such an appeal.

5. Insofar as it may be contended that the losing party may not be able to establish that disqualification affected the result, the same is true of a failure to disqualify.

2. Appealability Will Tend to Further, Not Frustrate, the Interests of Efficient Judicial Administration.

Viewed in terms of efficient judicial administration, sound policy would dictate that a potentially tainted proceeding be "nipped in the bud". See *White Motor Corp. v. White Consolidated Industries, Inc.*, 60 Ohio App.2d 82, 395 N.E.2d 1340, 1346 (1978) (". . . providing for an appeal on the issue of disqualification of counsel may effect a savings of judicial time in that a cause, otherwise properly tried below, need not be retried should an appellate court determine that the failure to disqualify counsel was reversible error."). Nor is there real merit in the argument that to permit appeals from orders denying disqualification necessarily tends to unduly delay the proceedings. See *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (D.Col.Cir. 1976). In fact, the gratuitous assumptions upon which that argument is premised will not bear analysis.

First of all, it cannot be assumed (as the argument in question implies) that the progress of the case will in fact be impeded by such an appeal. For example, in the present case, there has been no attempt to foreclose discovery pending a resolution of the disqualification issue. Nor would the mere taking of an appeal serve to stay proceedings in any event—a factor in itself likely to dissuade use of such appeals for purely dilatory purposes. And should special circumstances warrant that a stay be granted in a particular case, the appellate process can be expedited accordingly. See, *e.g.*, *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975) (matter briefed and argued on expedited basis).

Secondly, the time required for such appeals need not be inordinate, as the present case (in which the total time expiring between the filing of the notice of appeal and the

submission of the reply brief in the Court of Appeals was a mere 3 months) amply attests. Indeed, the trial court here found that "an immediate appeal from [its] ruling may *materially advance* the ultimate termination of [the] litigation" (Emphasis added). (A. 160).

Finally, if in a given case it should appear that an appeal is frivolous, appropriate sanctions can be invoked. See 28 U.S.C. §§1912, 1927, Fed. Rules. App. Proc., Rule 38. See *e.g., Church of Scientology of California v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980).

Apropos here is this Court's observation in rejecting a similar argument against applying the *Cohen* doctrine to appeals from pretrial orders denying motions to dismiss indictments on double jeopardy grounds:

> "[W]e believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy." (*Abney v. United States*, 431 U.S. 651, 663 (n.8) (1977).

C. The Rationale of Armstrong v. McAlpin is Unsound.

We will not burden this Court with a case-by-case analysis of the various circuit court opinions which have opted for or against appealability. We do believe it appropriate, however, to address the recent *en banc* opinion of the Second Circuit in *Armstrong v. McAlpin*, ... F.2d .... (No. 79-7042, June 20, 1980),[29] where, in the latest stage of what

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[29]The *Armstrong* opinion (published after the Court's grant of *certiorari* here) states that it is designed to make known the circuit's current view. (*Armstrong*, p. 13, note 14). (References to *Armstrong* (not yet published), cited *Armstrong*, p. ...., are to the opinion as filed.)

the dissent characterized as a process of tergiversation,[30] the court overruled its prior *en banc* opinion in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) and held that orders denying disqualification were not appealable under 28 U.S.C. §1291.

Before assessing the reasoning of *Armstrong*, three preliminary observations regarding that case are in order. First, true to the adage that "hard cases make bad law", the majority appears to have been influenced by its perception of the merits of the underlying case, which it viewed as "charging serious abuses of the securities laws" (*Armstrong*, p. 10) and as involving "the efforts of a receiver, appointed at the request of a public agency, to obtain redress for alleged serious frauds on the investing public" (*Armstrong*, p. 24).

Secondly, the court in *Armstrong* appears to ground much of its reasoning[31] on the views expressed in a student Com-

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[30]The dissent notes that since 1956 (when a panel majority (Judges Swan and Learned Hand) in *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956) held *Cohen* applicable to denials of disqualification) the Second Circuit now has reversed its position three times. See, in addition to *Silver Chrysler Plymouth* and *Armstrong*, *Fleischer v. Phillips*, 264 F.2d 515 (2d Cir. 1959).

[31]The majority also cites the views expressed in Professor Moore's treatise on *Federal Practice*—views possibly colored by the author's general belief that the *Cohen* doctrine itself is largely obsolete (Moore at §110.10). The latter belief obviously is not shared by this Court (see, *e.g.*, *Abney v. United States*, 431 U.S. 651 (1977); *Eisen v. Carlisle & Jacquelin*, 427 U.S. 156 (1974)) or by the authors of another well-known treatise in the field. See *Wright, Miller, Cooper, Federal Practice and Procedure:* Jurisdiction §3911 (1976) at p. 500 (quoted at p. 17, note 22 of this Brief).

ment[32] at 45 U.Chi.L.Rev. 450 (1978))[33] in which the author premises his criticism of appealability largely on the charge—for which no persuasive evidence is cited[34]—that the motions for disqualification from which such appeals are taken generally are mere instruments of what the author perceives as "harassment" (45 U.Chi.L.Rev. at 450)—an

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[32]The views expounded in that student Comment are not shared by all student authors. Thus a Note at 11 Ga.L.Rev. 705 (1977), criticizing the non-appealability holding of *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (D.Col.Cir. 1976), observes:

> "In such a flexible area the court seems to have abdicated its responsibility by drawing the line so that no appeal will lie. The court ignored the fact that disqualification proceedings are different from other interlocutory orders because of the important public interest at stake, particularly when a former government official is involved. While it is true that the trial court has broad discretion in ruling on these orders and that the court of appeals should not become the 'overseer of the ethics of the members of the legal profession,' the court does have responsibility for imposing ethical restraints on lawyers—particularly on those who were formerly in government services—that will restore public confidence in the legal system. In view of the *cozy* relationship between former government attorneys and large law firms, failure to adjudicate the attorney's disqualification immediately and finally will diminish public confidence in the attorney-client relationship. Allowing even the appearance of impropriety to pervade an entire proceeding will undermine the public's faith in the judicial process. If public confidence in the judicial system is as important as it has been declared to be by courts that have ruled on the merits of disqualification, final resolution of these issues demands immediate review." (footnotes omitted) (11 Ga.L.Rev. at 713-714)

See also Note, 30 Vand.L.Rev. 259, 273 (1977) (also criticizing non-appealability holding of *Community Broadcasting*): ("Since orders denying disqualification of counsel can harm the litigant irreparably and taint the merits of the action, the court has a responsibility to avoid these consequences by granting immediate appeal to such orders.")

[33]The *Comment*, entitled "The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts", is referred to in *Armstrong* (and, for convenience, here also) as the "Chicago Note".

[34]The author's conclusory assertion that denials of disqualification rarely are reversed is not borne out by the statistics cited at page 23 of this Brief.

assumption at odds with the data described at page 23 of this Brief.[35]

Third, the court in *Armstrong* purports to distinguish between orders denying and granting disqualification, viewing the latter as still appealable under *Cohen*, although admittedly troubled by the logic of the distinction. (See *Armstrong*, p. 14, note 15).[36] In support of this distinction, the court cites a series of familiar arguments, the general nature and fallacy of which have been discussed at page 25, note 28 of this Brief and need not be repeated here.[37]

Turning to the rationale of *Armstrong*, the majority suggest that an order denying disqualification (while concededly collateral (*Armstrong*, p. 10)) is not appealable under *Cohen* in that: (1) it does not meet the test of urgency; *i.e.*, any error is correctable on a post-judgment appeal; and (2) it does not meet a supposed *Cohen* test of importance, which

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[35]While much of the dispute on the merits in *Armstrong* centers on the applicable standard, the fact that the original panel held for disqualification (see *Armstrong v. McAlpin*, 606 F.2d 28 (2d Cir.1979)) and one of its members still dissents, would tend to dispel any suggestion the appeal was frivolous. Indeed, the lengthy list of amici and the appellate court's own reference to the issue as important would themselves tend to negate any such notion.

[36]*E.g.*, the court's suggested test of "importance" (*i.e.*, as involving questions of law versus fact) would not support appeals from orders granting disqualification.

[37]In addition to the more familiar arguments, the court in *Armstrong* suggests (p. 15) that financial inability to replace counsel may terminate the litigation—an echo of the now discredited "death knell" doctrine. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

the *Armstrong* court perceives as at least generally requiring potentially decisive legal (as opposed to factual) questions.[38]

Upon analysis, neither ground is sound. As previously noted (Point IA), a post-judgment appeal simply cannot undo the personal and public harm which flow from an unredressed conflict. And while we believe that the order in the present case would qualify even under the *Armstrong* test of importance (in that the issue involves a broad general principle to be resolved on essentially undisputed facts), we submit that the test itself (urged by the author of the Chicago Note) is fallacious in that it runs counter to this Court's pronouncements and holdings on the subject. (See page 19, *supra*).[39]

Equally unsound are the *Armstrong* court's perceptions of the underlying policy considerations. The court expresses

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[38]The court suggests two analogies, neither of which is apt:

1. Discovery orders, which are distinguishable on several grounds: *E.g.*, (a) they do not give rise to the ethical concerns, and related questions of private injury and public policy, which are posed by attorney conflicts of interest; (b) the party ordered to furnish discovery has control over compliance and may test the order by contempt, a choice not available in the disqualification context; and (c) the volume of the two categories of orders obviously is not similar.

2. Orders involving challenges to a trial judge, which again are readily distinguishable: *E.g.*, they do not pose questions of breach of loyalty or breach of confidence but merely of a possible erroneous decision; hence they do not so clearly satisfy the *Cohen* tests of separability and urgency. Moreover, any claimed discrepancy in treatment may infer that *Cohen* should be applied in the trial judge context (a question we need not address here) rather than that it should not be applied in the present context.

Moreover, if the discovery or trial judge analogy were deemed apt, why is appeal to be allowed where disqualification is granted?

[39]The *Armstrong* majority suggests that the cases in which this Court did not follow the "fact" versus "law" dichotomy urged in *Armstrong* involved threatened destruction of very important rights. Unfortunately, the *Armstrong* majority fails to recognize that the rights vindicated in disqualification motions also are very important.

concern at assumed delays[40] stemming from appealability.[41] But as previously noted (see page 26), that assumption not only is unwarranted but also fails to give proper weight to the court's power to devise ample procedural safeguards to forestall any such possibility without depriving the aggrieved party of any meaningful redress. Even if there were substantial evidence of potential abuse,[42] *Abney v. United States*, 431 U.S. 651, 662 (note 8) (1977) teaches that the proper remedy would be not to decline appealability but to employ suitable procedures from the court's broad arsenal to curtail such abuse. And insofar as the court professes concern over the possible volume of such appeals, it fails to muster any persuasive factual support, let alone to take account of the possible procedural devices suggested by this Court in *Abney* for curbing any real abuse if it should arise.[43]

Nor is there merit to the court's suggestion (a restatement of views expressed in the Chicago Note) that §1292(b)[44] or §1651 provides a suitable alternative where disqualification is denied (although the court does not so relegate the loser

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[40]A typical fallacy in the Chicago Note is the author's assumption that an appeal under 28 U.S.C. §1291 (unlike an appeal under §1292(b)) necessarily will stay the proceeding below. See 45 U.Chi.L.Rev. at 472.

[41]While the court in *Armstrong* states that the suit there was frozen for a substantial period, it acknowledges that a portion of this time was due to successive panel and *en banc* consideration (with successive opinions in September, 1979 and June, 1980) and does not mention the possibility that an expedited appeal might have been helpful.

[42]Where disqualification is ordered, any delay would appear more plausibly chargeable to the offending attorney, not the moving party.

[43]As for the *Armstrong* court's reference to an "impression" that such motions have increased (*Armstrong*, p. 10), apart from its vagueness, there is an obvious distinction between the quantity of trial court motions and the quantity of appeals. Clearly there is no indication that the latter is of great magnitude.

[44]The Chicago Note itself concedes that the criteria of §1292(b) would not apply to most orders denying disqualification. (45 U.Chi.L.Rev. at 471).

if disqualification is granted). The fallacies in that argument have been adverted to previously (page 16, *supra*), and need not be repeated here.

Finally, we submit that *Armstong* itself indirectly points up the need for appealability, insofar as the appellate court there, in addressing the merits, notes the need for guidance so that the trial courts will not be "cut . . . adrift", in light of a projected future in which the court foresees its rule of non-appealability as affording less opportunity for guidance. (*Armstrong*, p. 15). Indeed, it seems ironic that the court should have adopted a rule of non-appealability in a case (involving what the circuit court refers to as an important issue pertaining to disqualification of former government counsel), which seems to point up the very need for appeal which the court purports to foreclose.

II.

THE CONFLICT DISCLOSED BY THE PRESENT RECORD REQUIRES THAT ATTORNEY RISJORD BE DISQUALIFIED.

A. The "Consent" Approach Adopted Below Was Inherently Unsound.

The record below reflects (essentially without contradiction) that attorney John Risjord and his firm, who represent the plaintiffs in certain product liability (wheel and rim) cases against Firestone, also have a long-standing relationship as attorneys for Firestone's product liability insurer (The Home Insurance Company) which the Risjord firm holds out as its foremost insurance client[45] (A. 12, 50, 62,

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[45]See, *e.g.*, Addendum A to this Brief, following page 45.

90-91, 98-99, 100-102, 105-106, 111, 134, 157-158.)[46] Based on an "intentional tort" theory espoused by Risjord (A. 12, 50, 62), Home disclaimed coverage under its policy (A. 113, 115; see also A. 197, 198). Firestone, voicing concern that Risjord's management of the cases inevitably would be colored (consciously or unconsciously) by his awareness of Home's interest (as insurer of those very claims) in defeating coverage, moved to disqualify Risjord, noting that the conflict inherent in Risjord's position was detrimental both to Firestone and the plaintiffs to whom Risjord owed a duty of undivided loyalty.

The trial court, while finding that the resulting conflict was likely to adversely affect Risjord's exercise of his independent judgment (A. 160), nevertheless held that Risjord might remain in the cases provided he obtained the consent of Home (which stood to benefit by the very conflict complained of) and the Risjord Plaintiffs (who were hardly of sufficient sophistication to appreciate the conflict) (A. 160, 165-166), irrespective of any objection interposed by Firestone. The Court of Appeals, without addressing the facts (essentially undisputed) in any meaningful detail, purported to uph' 'd the trial court's action as a permissible exercise of discr on (A. 203).

Actually, the trial court's action represents a misapplication of the disciplinary rule (Disciplinary Rule ("DR")

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[46]While the trial court found that the Risjord firm was not on a formal retainer fee arrangement with Home (A. 157), that fact is irrelevant in the present context. (See, *e.g.*, *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978).)

5-105[47], derived from the Code of Professional Responsibility of the American Bar Association (''ABA Code'')) which the trial court purported to apply.

In essence, DR5-105 precludes an attorney from accepting or continuing employment ''if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client,'' (except to the limited extent permitted under the consent provisions of DR5-105(C)). The Rule is in furtherance of the policy articulated in Canon 5 of the ABA Code, that ''a lawyer should exercise independent professional judgment on behalf of a client'', and the mandate of Canon 9 that ''a lawyer should avoid even the appearance of professional impropriety''.

The Rule contains a carefully drawn exception whereby informed consent by all affected interests may obviate a conflict where it is ''obvious'' that the challenged attorney

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[47]DR5-105 (*i.e.*, the Missouri version (adopted in the Western District), which omitted some additional language found in the ABA Code) provides:

''(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.''

can adequately represent the various interests involved and all affected interests join in the consent. DR5-105(C). The trial court purported to apply that exception as a basis for permitting Risjord to continue in the cases in question. But such a consent approach was not viable in the present context, since the "consent" exception is not designed to sanction situations involving "such delicate conflicting relationships and inescapable divided loyalties" as are here present. As noted in *Matter of Kelly v. Greason*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) (from which the quoted phrases are taken), in such cases "the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct. Where divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally to the client, or the appearance of misconduct will be unavoidable [citing cases]. Moreover, the unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him (*Matter of Young*, 188 App.Div. 538, 542-544, 177 N.Y.S. 259, 261-63)." Cf. *Sapienza v. New York News, Inc.*, 481 F.Supp. 676 (S.D.N.Y. 1979) (Attorney representing plaintiffs and defendant A successfully challenged by defendant B despite consent of plaintiffs and A).

Nor could any viable "consent" approach be taken in any event without providing for the consent of *all* affected parties, including Firestone. Pertinent here is the following observation in *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976): "*Putting it as mildly as we can*, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge *and* consent of *all* concerned." (Emphasis added). 528 F.2d 1384, 1386 (2d Cir. 1976). Even assuming, *arguendo*, that Home and the individual plaintiffs consented, Firestone has *not* consented. Therefore, Risjord has

not secured and cannot possibly secure the "consent of *all* concerned".

By disregarding these principles, the lower courts have in effect used the "consent" provision of DR5-105(C) to emasculate the main thrust of DR5-105 and the fundamental ethical principles it embodies. While the adverse effects of that emasculation far transcend the insurance context, their destructive effect in the insurance context is itself cause for general concern, as the present case amply demonstrates.

It is inherently impossible for one in Risjord's position to exercise the independence of judgment which an attorney's duty of undivided loyalty demands. Risjord's tactical and strategic choices in prosecuting the claims of the Risjord Plaintiffs (*e.g.*, in deciding whether and if so how aggressively to pursue his "intentional tort" theory) cannot be divorced from his awareness that his actions may impinge on the success or failure of his long-standing client, Home, in avoiding liability under the Firestone policy.

Even if Risjord's "intentional tort" theory was not consciously conceived with Home's interests in mind, in determining whether and to what extent to pursue it, his independence of judgment must inevitably be clouded by his awareness that such a theory is helpful (and its abandonment harmful) to his client Home. In the face of that awareness, Risjord cannot assess the tactical and strategic "pros" and "cons" of such a theory (*e.g.*, whether it may appear so far-fetched as to weaken the balance of the Risjord Plaintiffs' cases in the eyes of the jury) with the degree of independence which his duty of undivided loyalty demands. *A fortiori*, how can it be said that Risjord's conduct has not created an "appearance of impropriety" which can be dispelled only by his disqualification?[48]

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[48]See, *e.g.*, the role of Risjord in the *Rodriguez* case, discussed at note 8 p. 4, *supra*.

Nor are the concerns voiced by Firestone novel or unique. The courts have taken note of the danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit. See, *e.g.*, *Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638, 647, 39 Cal.Rptr. 731, 394 P.2d 571 (1964) ("in cases involving multiple claims against the insured, some of which fall within the policy coverage and some of which do not, the insurer may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely upon the insured". (footnote omitted)). See also *Comment: The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 Univ.Pa.L. Rev. 734, 736 (1966), noting "the insurer's natural tendency to confine the third party's action to claims outside of coverage as soon as possible, even at the expense of the insured's interest."

While *Tomerlin* involved an insurer-linked attorney engaged to represent an insured defendant, the danger is no less real when such counsel purport to represent a plaintiff. Indeed, the risks are compounded, due to the greater control exercised by plaintiff's counsel over the theory of the action, the fact that *two* interests (*i.e.*, the plaintiff and the defendant-insured) are placed in jeopardy, and the increased difficulty of assessing the attorney's motives in a context where breaches of loyalty are less likely to be flagrantly apparent. Indeed, the impossibility of detecting and policing the possible impact of the insurer's interests on subtle nuances of tactics and strategy renders the danger particularly serious in the plaintiff-attorney context. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (". . . to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.").

Moreover, in light of Home's fiduciary obligations to Firestone and Firestone's vital stake in the actual and potential consequences of the conflict, a "consent" approach which ignores Firestone's interests is not viable. At the very least, Firestone's consent or permission should be required as a precondition to any consent by Home, having in mind the risk that Home, notwithstanding its fiduciary duty not to take or permit any action respecting the conflict or its resolution which is or may appear to be detrimental to Firestone's interests, might choose to gamble on the conflict in the hope of benefiting at Firestone's expense. Indeed, Home's very willingness to consent to Risjord's dual role would itself be indicative of potential collusion, or at least that Home expected Risjord to be influenced by Home's interests.

Under these circumstances, the mere "consents" of Home and Risjord's personal injury plaintiffs could not dispel the "appearance of impropriety" stemming from Risjord's dual role. On the contrary, Home's consistent effort to keep Risjord in the case as its ostensible opponent is itself cause for concern.

Nor can Risjord's retention be justified in terms of a concern for the interests of the plaintiffs he presently represents. To the extent any avenues presently pursued by Risjord may have sufficient merit to warrant pursuit in plaintiffs' interest, they can be pursued at least as effectively by counsel free of the differing interests which may color or appear to color, and thereby inevitably will taint, Risjord's actions. And to the degree, if any, that the evidence, viewed in a light uncolored by coverage considerations, were to warrant pursuit of an intentional tort theory, such counsel would be free to pursue it. In fact, they would have even greater freedom of action in that regard, since they would be untroubled by concerns that their motives might be sus-

pect. At the same time, Risjord's replacement with truly independent plaintiffs' counsel will further the paramount goal of preserving public confidence in the administration of justice.

B. The Purported "Consents" Filed by Risjord Could Not Obviate the Need for Disqualification in Any Event.

While a "consent" approach would not be workable here in any event for the reasons noted at Point IIA, brief mention should be made of the deficiencies in the consents Risjord purported to obtain—deficiencies which not only are of significance in their own right but which also point up the impracticability of the trial court's purported "solution."

Turning first to the tenor of the "consents" themselves, it should be noted that neither Home nor the Risjord Plaintiffs has consented to the *dual* representation. At most, Home merely "consents" to the Risjord firm's continued representation of *Home*, while the Risjord Plaintiffs merely "consent" to the Risjord firm's representation of the *Risjord Plaintiffs* (A. 167). Thus, the Home "consent" is framed as follows: "[T]he Home Insurance Company hereby consents to the continued representation of Niewald, Risjord & Waldeck of the Home Insurance Company *in the case of Cannova Enterprises*, Inc., d/b/a Mr. C's 103 vs. Home Insurance Company, et al." (A. 171) (Emphasis added). Home does not even purport to consent to Risjord and his firm representing the *Risjord Plaintiffs*. Absent such consent, the requirements of DR5-105(C) cannot be deemed satisfied in any event.

Turning first to the pertinent language of DR5-105(C):

> "A lawyer may *represent multiple clients* . . . if each consents to *the representation* after full disclosure of the possible effect of *such representation* on the

> exercise of his independent professional judgment on behalf of each.'' (Emphasis added).

The quoted language clearly contemplates that each client consent not merely to continued representation of himself but to the continued representation of the adverse party as well.

Also pertinent here is the following language from *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976): ''Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit *against his own client* without the knowledge and consent of all concerned.'' (Emphasis added). In terms of the present case, Home's ''consent'' would have to include, *inter alia*, consent to the Risjord Firm representing the Risjord Plaintiffs in suits *against Home's insured*, Firestone. Yet Home's consent does not even purport to do so.

Over and beyond the deficiencies stemming from the tenor of the ''consents'' is a further inadequacy, *i.e.*, a failure to satisfy the requirement of DR5-105(C) that consent be obtained from those affected after ''full disclosure of the possible effect of such representation on the exercise of [the attorney's] independent professional judgment on behalf of each''.

The requisite standard of disclosure is an exacting one. See, *e.g.*, *I.B.M. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978):

> ''Clearly, full and effective disclosure of all the relevant facts must be made and *brought home* to the prospective client.'' 579 F.2d at 282 (footnote omitted, quoting Justice Story in *Williams v. Reed*, 3 Mason 405, 418, Fed. Cas. No. 17,733 (C.C. Maine 1824) (Emphasis added).

Risjord's Report (A. 167) falls far short of that standard. Risjord's own affidavit lacks any specificity and offers only

vague generalities, as do the "consents and approvals" of referring counsel of the Risjord Plaintiffs. The "consents" of the Risjord Plaintiffs are likewise unilluminating, except insofar as they point up their inadequacies. In essence, each of the Risjord Plaintiffs signed a "pro forma" affidavit, reciting that Risjord represented Home in a case involving fire insurance and that Home (which is listed as a representative client in Martindale-Hubbell) is a client of the Risjord firm "on a case-by-case basis . . ."; that Home does or may have an interest as excess liability insurer in their cases against Firestone; and that "[w]ith full knowledge of the relationship of the Niewald, Risjord & Waldeck law firm to the Home Insurance Company and its affiliates, the undersigned plaintiff consents and agrees to the continued representation by Niewald, Risjord & Waldeck of the undersigned claim against" Firestone. Rather than bringing home to his clients the real nature and significance of the conflicts and their consequences, as contemplated by the full disclosure rule, Risjord appears to be "playing down" and attempting to justify his continued representation of conflicting interests—*e.g.*, by focusing on such self-serving irrelevancies as the difference in subject matter between the Risjord Plaintiffs' cases and a case in which Risjord represented Home, and Risjord's claim that he has no formal retainer arrangement with Home but takes matters on a case-by-case basis. There is no evidence in any of these affidavits that any of these lay persons were told what Firestone has charged or what the trial court has found—*e.g.*, of Firestone's concern over the danger that Risjord's independent judgment may be impaired by a conscious or unconscious desire to aid Home vis-a-vis Firestone. Indeed, there is no showing that any *meaningful factual disclosure* was made to the Risjord Plaintiffs.

Viewed in the context in which the "consents" were obtained, these deficiencies appear symptomatic of an even more fundamental reason for finding the "consent" ap-

proach inapposite in the present context—*i.e.*, the unlikelihood that persons of relatively limited sophistication in legal matters could fully appreciate the subtle risks to which Risjord's dual representation subjects them.

C. Home's Efforts to Preserve Risjord's Status as Counsel for Plaintiffs Reinforce the Concerns Inherent in the Basic Conflict.

While the concerns inherent in the basic conflict in which Risjord finds himself are themselves ample to justify the relief sought by Firestone, those concerns are reinforced by what appears to be a dominant theme in these proceedings—*i.e.*, Home's persistent efforts to preserve Risjord's status as counsel for plaintiffs.

Indeed, the unusual ardor with which Home consistently seeks to aid Risjord's cause in these proceedings is itself ground for concern, given Home's awareness that the strategy and tactics employed by Risjord may affect the outcome of Home's efforts to avoid coverage of the Risjord Plaintiffs' claims under the Firestone policy.

Thus, Home's "consent" to Risjord's representation of Home in *Cannova* contains gratuitous statements which appear calculated to argue Risjord's case in seeking to avoid disqualification: *e.g.*, by seeking to "play down" Risjord's relationship to Home and disclaiming Risjord's receipt of Firestone data from Home (A. 170).

Again, Home's letter of November 6, 1979, purporting to urge Risjord's withdrawal from *Cannova*, is laced with statements which appear calculated to serve no purpose except to argue Risjord's case in resisting disqualification: *e.g.*, it seeks to minimize the role of Risjord as Home's attorney in *Cannova* (A. 191) and gratuitously seconds Risjord's contention that Home has not supplied Risjord with data it obtained as Firestone's insurer (A. 192). If drafted

by Risjord, Home's inclusion of such statements is indicative of collusion; if drafted independently by Home, it reflects a desire to secure Risjord's continued representation of the Risjord Plaintiffs, a desire which is itself highly suspect. Here, again, the very vehemence with which Home indirectly endorses Risjord's position itself creates an appearance of impropriety which only the disqualification sought by Firestone can dispel.

While admittedly less clear-cut than the examples previously cited, mention should be made of one further instance in which Home's actions tended to support Risjord's efforts to avoid disqualification. Shortly after Risjord, in the course of his deposition, erroneously suggested that Firestone was insured not by Home Insurance Company but by Home Indemnity Company (A. 90-91) (a related entity), a member of Home's staff suddenly departed from past practice by writing to Firestone for the first time on the letterhead of Home Indemnity Company (A. 145). This remarkable coalescence has never been explained.

Two facts emerge from this series of events which tend to reinforce the concerns which prompted Firestone's initial Motion for Disqualification:

1. Home appears determined to have Risjord as its ostensible adversary; and

2. Home and Risjord appear to be acting in tandem to that end.

The coalescence of actions between Home and Risjord also points up a further danger stemming from Risjord's dual relationship with Home and the Risjord Plaintiffs: *i.e.*, the possibility that Home might divulge to Risjord information which Home elicits in confidence from its insured, Firestone, in furtherance of Risjord's "intentional tort" theory and Home's companion effort to avoid coverage under

the policy (A. 112). The integrity of the judicial process requires that any such temptation to concerted action in breach of Home's fiduciary obligations to Firestone be removed by precluding the dual representation which creates that temptation.

Conclusion.

Upon analysis, the rule adopted by those circuits allowing appeals from orders denying disqualification of counsel is seen to be fully consistent with the doctrine of *Cohen v. Beneficial Industrial Loan Corp.* and with sound judicial policy.

The present case itself attests to the need for such a rule, inasmuch as the trial court failed to redress effectively a patent conflict. As appears from the above analysis, that conflict can be obviated and the underlying public policy considerations vindicated only by granting Firestone's motion for Risjord's disqualification.

Respectfully submitted,

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ADDENDUM A.

Illustrative "Card" of Risjord Firm in Martindale-Hubbell Law Directory (A. 100).

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Corporation, Insurance,
Probate, Tax and
Estate Planning Law

(ATTORNEY BIOGRAPHIES OMITTED)

REPRESENTATIVE GENERAL CLIENTS: Southwest Grease & Oil Co.; Builders Hardware and Appliance Co.; City Volkswagen, Kansas City, Kansas; Jenkins & Blaine Construction Co., Kansas City, Missouri; Johnnie Walker Medical Electronics, Inc.; Raytown, Missouri; Merriam Volkswagen, Merriam, Kansas.

REPRESENTATIVE INSURANCE CLIENTS: The Home Insurance Co.; Crum & Forster Group; Republic-Vanguard Insurance Cos.; Great American Insurance Co.; Royal-Globe Insurance Group; The Hanover Insurance Group; Firemens Fund-American Insurance Group; Consolidated Mutual of Brooklyn, New York; Grain Dealers Mutual Insurance Co.; Insurance Company of North America; Mill Mutuals: Millers Mutual of Alton, Illinois; New Hampshire Insurance Co.; Northwestern National Insurance Co.; State Farm Fire Insurance Co.; Commercial Union and North British Group; Sentry-Hardware Group; American States Insurance Co.; Hartford Fire Insurance Co.; Continental

National American Group; Chubb/Pacific Indemnity Group; The Aetna Insurance Co., Shawnee Mission, Kansas; Aetna Life and Casualty Co., Kansas City, Missouri; A.F.I.A. World Wide Insurance, New York, N.Y.; Atlantic Cos., Kansas City, Missouri, Cravens, Dargen & Co., Special Risks, Houston, Texas; Holiday Inns of America, Memphis, Tennessee; Industrial Indemnity Co., Dallas, Texas; Market Facilities, Inc., Los Angeles, California; Safeway Stores, Kansas City, Missouri; Skaggs Drug Co., Salt Lake City, Utah; State Security Insurance Co., Edwardsville, Illinois; Utica Mutual Insurance Co., Utica, New York; Western Casualty & Surety Co., Kansas City, Missouri.

REFERENCE: Commerce Bank of Kansas City, N.A.

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1420

In the Supreme Court of the United States

October Term, 1979

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT RISJORD

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QUESTIONS PRESENTED FOR REVIEW

1. As stated under Question one in brief of Petitioner Firestone. (See Point I)

2. Should this court reconsider factual and discretionary findings related to claimed conflicts of interest already ruled by the District Court and Court of Appeals? (See Point II)

3. Should this Court in the first instance disqualify attorney Risjord where the District Court's ruling applying DR5-105 was proper and evidences no abuse of discretion and in light of the fact that since that ruling Risjord no longer represents clients with potentially conflicting interests? (See Point III)

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT—

I. An Order Denying a Motion to Disqualify Counsel on Ethical Grounds Is Not a Final Appealable Order Under 28 U.S.C. § 1291 12

A. An order denying a motion to disqualify counsel does not resolve important legal issues but rather involves a case by case exercise of discretion 15

B. Review after final judgment of an order denying motion to disqualify counsel does not present a danger of irreparable harm, except in extraordinary situations 17

C. Practical considerations of the abuse of disqualification motions require that denial of such motions be appealable only after final judgment 20

II. The District Court and Court of Appeals Have Ruled Upon the Factual and Discretionary Issues Relating to Disqualification and Those Findings Should Not Be Disturbed by This Court 22

III. The District Court Properly Permitted Risjord to Continue to Represent Plaintiffs in the Rim Cases With Consent of His Clients Under DR5-105(C), and His Later Withdrawal From the Home Fire Case and Its Dismissal Eliminate Any Claim of Conflict 25

PREVIOUS PAGE WAS BLANK

A. Firestone's argument is based on an abbreviated and incomplete statement of facts 25

B. There was no attorney/client relationship that gives Firestone standing to disqualify Risjord, and Risjord's representation of Home creates no conflict with Firestone 27

C. The requirements of Canon 5 and DR5-105(A)-(C) have been satisfied by the court's requiring the consents of Home and plaintiffs, which are fully adequate 32

D. The consents filed by Risjord are fully adequate to satisfy the court's order and the requirements of DR5-105(C), and Firestone did not question their adequacy before appeal 35

E. Risjord's termination of representation of Home conclusively eliminates any question of conflict 37

F. The discretion of District Judge Collinson was very broad and his order should be reversed only for clear abuse of his discretion 41

G. The true reason for Firestone's motion is to eliminate a vigorous advocate 42

H. There is no appearance of impropriety, and this ground standing alone does not justify disqualification 46

I. Firestone's desire to disqualify Risjord in the Hale case is beyond the relief sought in the District Court 48

CONCLUSION 50

ADDENDUM 51

Table of Authorities

CASES

Abney v. United States, 431 U.S. 651 (1977) 19
Abraham Construction Corp. v. Armco Steel Corp., ... F.2d ....., No. 79-2007 (5th Cir., hearing en banc ordered Oct. 22, 1979) 14
Acorn Printing Co. v. Brown, 385 S.W.2d 812 (Spr. Mo. Ct. App. 1964) 34
Allegaert v. Perot, 565 F.2d 246 (2nd Cir. 1977) 17, 21, 41, 42, 48
Arkansas v. Dean Food Products Co., 605 F.2d 380 (8th Cir. 1979) 40
Armstrong v. McAlpin, ... F.2d ....., No. 79-7042 (2nd Cir. June 20, 1980) ..... *passim*
Baker v. United States Steel Corp., 492 F.2d 1074 (2nd Cir. 1974) 18
Berenyi v. Immigration Service, 385 U.S. 630 (1967) 23
Board of Education v. Nyquist, 590 F.2d 1241 (2nd Cir. 1979) 46, 48
Branti v. Finkel & Tabakman, ... U.S. ....., 63 L.Ed. 2d 574 (1980) 10, 23
Central Milk Producers Cooperative v. Sentry Food Stores, Inc., 573 F.2d 988 (8th Cir. 1978) 15, 44-45, 45
Chavez v. Chenoweth, 553 P.2d 703 (N.M. 1976) 30
Church of Scientology of California v. McLean, 615 F.2d 691 (5th Cir. 1980) 14, 40, 46
Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2nd Cir. 1976) 29, 33, 38
Cobbledick v. United States, 309 U.S. 323 (1940) 13
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) .....*passim*

Community Broadcasting of Boston, Inc. v. F.C.C., 546 F.2d 1022 (D.C. Cir. 1976) 7, 8, 9, 13, 16, 21, 22
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) ..... *passim*
Craig v. Iowa Kemper Mutual Insurance Co., 565 S.W. 2d 716 (K.C. Mo. Ct. App. 1978) 30
Eckles v. Furth, 557 F.2d 953 (2nd Cir. 1977) 17
Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977) 41, 46
Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975) 14
Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2nd Cir. 1977) 15
Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 (9th Cir. 1976) 15, 42
Gillespie v. U. S. Steel Corp., 379 U.S. 148 (1964) 16
Government of India v. Cook Industries, Inc., 569 F.2d 737 (2nd Cir. 1978) 41
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 10, 23
Grinnell Corp. v. Hackett, 519 F.2d 595 (1st Cir. 1975) 16
Hoffman v. Hogan, 137 S.W.2d 441 (Mo. 1940) 39, 40
Holloway v. Arkansas, 435 U.S. 475 (1978) 30
Hull v. Celanese Corp., 513 F.2d 568 (2nd Cir. 1975) 15, 42
In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980) 18
In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976) 27, 28, 29, 34, 36
International Business Machines Corp. v. Levin, 579 F.2d 271 (3rd Cir. 1978) 11, 29, 32, 33, 41
International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2nd Cir. 1975) 17
Kelly, Matter of v. Greason, 23 N.Y.2d 368, 296 N.Y. Supp.2d 937, 244 N.E.2d 456 (1968) 30, 33, 38

MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395 (4th Cir. 1977) 14
Meat Price Investigators Association v. Spencer Foods, Inc., 572 F.2d 163 (8th Cir. 1978) 44
Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) 8, 9, 12, 13, 17, 21, 22
Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J. 1977) 29, 34
Moritz v. Medical Protective Co. of Fort Wayne, Indiana, 428 F. Supp. 865 (W.D. Wisc. 1977) 11, 37, 39
Parkinson v. April Industries, Inc., 520 F.2d 650 (2nd Cir. 1975) 15
Payne v. St. Louis Grain Corp., 562 S.W.2d 102 (St. L. Mo. Ct. App. 1977) 27
Redd v. Shell Oil Co., 518 F.2d 311 (10th Cir. 1975) 45
Rosen v. Sugarman, 357 F.2d 794 (2nd Cir. 1966) 18
Rudolph v. United States, 370 U.S. 269 (1962) 10, 24
Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) 14
Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2nd Cir. 1974) 8, 14, 16, 42
Stack v. Boyle, 342 U.S. 1 (1951) 19
Tomerlin v. Canadian Indemnity Co., 61 Cal.2d 638, 39 Cal. Rptr. 731, 384 P.2d 571 (1964) 30
Trone v. Smith, ... F.2d ....., No. 77-1832 (9th Cir., June 23, 1980) 41
United States v. MacDonald, 435 U.S. 850 (1978) 19, 20
United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 23
United States v. State of Washington, 573 F.2d 1121 (9th Cir. 1978) 18
Waters v. Western Co. of North America, 436 F.2d 1072 (10th Cir. 1971) 10, 11, 15, 41

Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2nd Cir. 1972) 16

Whiting Corp. v. White Machinery Corp., 567 F.2d 713 (7th Cir. 1977) 39

Wong v. Fong, 593 P.2d 386 (Haw. 1979) 11, 38, 39

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 14, 21, 46, 47

STATUTES

28 U.S.C. § 1291 .....7, 8, 9, 12, 14, 15, 18, 19, 20

28 U.S.C. § 1292(b) 7, 8, 9, 13, 19, 22

28 U.S.C. § 1651 .....19, 22, 49

RULES

Mo. Dist. Ct. R. 43(IV)(B) 27

TREATISES, ARTICLES AND OTHER AUTHORITIES

18 A.L.R.3d 482 (1968) 31

Best's Insurance Reports, Property-Casualty 627 (1974) 31

81 *Best's Review* (*Property/Casualty*) 10 (June 1980) 31, 36

Canons of the American Bar Association Code, Canon 4 .....38, 40

Canons of the American Bar Association Code, Canon 5 38

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-102 47

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105 .....29, 32

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(A) 29, 34

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(B) 29, 34

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 5-105(C) 11, 29, 34, 49

Code of Professional Responsibility of the American Bar Association, Ethical Consideration 5-16 29

5 *Conflicts of Interest in Practice* 22 (Defense Research Institute 1971) 31

Couch on Insurance 2d § 23.11 (1960) 30

3A *Frumer & Friedman, Products Liability* § 4601 44

Heaney, *Appeals Process in the Eighth Circuit*, 78 F.R.D. 261 (1977) 24

4 Martindale-Hubbell Law Directory 99B (1979) 47

7 Martindale-Hubbell Law Directory 77M (1978) 31

Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH.L.REV. 1258 (1976) 44

Restatement of Torts, § 402A 12, 25, 44

Note, *The Appealability of Orders Denying Motion for Disqualification of Counsel in Federal Courts*, 45 U. CHI.L.REV. 450 (1978) 21

STATEMENT OF THE CASE

The statement of the case in Firestone's brief is argumentative and omits significant facts.

We refer to Petitioner as Firestone and Respondent as Risjord.

Risjord has handled one case for Home Insurance Company in the last ten years, the *Cannova* lawsuit, and his office handled a minimal number (A94, A98). Risjord withdrew from representation of Home in *Cannova* on November 7, 1979 at the direction of Home, and has not since represented Home. (A188, A191-2). The *Cannova* case was disposed of completely and dismissed with prejudice May 23, 1980 (Supp. Rec. Ex. C, 1).

Home Insurance Company is the insurer of Firestone under an excess policy in amounts in excess of either $50,000 (A150) or possibly $500,000 (A135). Under this policy Home does not have charge of the settlement or defense of claims, but has the right to associate with Firestone in defense and control of claims reasonably likely to involve Home (A234).

Risjord represents plaintiffs that have brought suit against Firestone. Risjord was selected as liaison counsel and lead counsel for plaintiffs in this multi-district litigation, which was approved by Judge Collinson in the first pre-trial order of March 29, 1979 (A81).

The Risjord complaints against Firestone contain essentially identical allegations. All allege claims based on defective products (A13, A29, A51, A63). The complaints allege that Firestone and in some cases, Goodyear, Kelsey Hays and Budd (A12, A50, A62), negligently, willfully, or intentionally committed some ten failures (paragraphs a through i and k) or deliberately withheld information

or misrepresented facts (paragraphs j and l, A15-16, A30-32, A52-53, A63-65). Count II alleges fraudulent misrepresentations in several numbered paragraphs (paragraphs 7 through 18, A19-23, paragraphs 3 through 15, A33-38, paragraphs 3 through 15, A43-48, paragraphs 8 through 17, A56-60, paragraphs 7 through 16, A67-71). The complaints seek actual and punitive damages (A23, A32, A38, A43, A49, A54, A61, A66, A72). In the Rodriquez case, another count is based on negligence and defective products (A26).

Risjord has filed complaints on behalf of a plaintiff against Goodyear Tire & Rubber Company, alleging identical claims (A205, A216).

In three of the Risjord cases, Goodwin, Butler and Rodriquez, Home Insurance Company wrote Firestone calling attention to the complaint allegations that Firestone "negligently, willfully or intentionally failed to recall, develop or redesign its steel rims." Firestone was told that any damages awarded in connection with willful or intentional acts would not be covered by the policy, reserving rights as to compensatory damages and denying coverage as to punitive damages (A113-116, A198-199). Home does not provide coverage in the Hale case (Br. 2, Note 3).

Letters with relation to five unrelated lawsuits have denied coverage for allegations of intentional acts or misrepresentations, willful acts or intentional concealment (A117-123).

Risjord has furnished no information on the hazards of multi-piece rims to Home Insurance Company (A95). Home has furnished no information to Risjord on these cases (A171, A192).

Risjord described his relation with Home Insurance Company. He understood that Home Insurance Company

was a fire company and he represented this company as long as he practiced law. He distinguished this from the Home Indemnity Company which wrote casualty business and he last did work of this kind in his early years of practice, 19 or 20 years ago (A91, A97). He knows nothing about the way Home Insurance Company undertakes to represent its policyholders in litigation, and in the last 19 or 20 years does not have any recollection of defending any Home Insurance Company insured. It is possible that his law firm has but he is not aware of it (A95, A99). He has had a number of such cases against Home insureds (A97).

Risjord was totally unaware that Firestone Tire & Rubber Company was ever insured or reinsured by Home Insurance Company, and he has no recollection of ever doing anything on behalf of any insurer for the Firestone Tire & Rubber Company or any subsidiary or affiliated company (A95). He does not know what connection Firestone Tire & Rubber Company has with Home (A98).

Home Insurance Company is the first-named representative insurance client in the Martindale-Hubbell Directory listing for Risjord's firm (A90). Risjord states that the order in which the clients are listed is not indicative of anything except that Martindale-Hubbell cannot alphabetize. He has written on proofs suggesting the list be alphabetized but this has not been done (A96). After making these suggestions, he gave up on it (A97).

Stock insurance companies habitually split the fire risks and the lead company hires counsel. This is the way he came to represent Home in the *Cannova* case (A98). General Adjustment Bureau hired him. Home had no choice but to accept Risjord's defense of Home's 10% interest in that dispute (A191, A171).

The *Cannova* litigation resulted in a claim for libel being asserted against Risjord as a defendant, and Mr. William Sanders, counsel for Firestone taking the deposition of Risjord, was employed to defend Risjord in that action (A92, A93). Sanders represented Risjord four years ago and knew of his representation of Home (A94).

District Judge William Collinson took up the motion to disqualify Risjord at a pre-trial conference August 10, 1979 (A148-149). He obtained stipulations that for the most part are incorporated in the formal findings. In addition, Risjord stressed that he represented the fire insurance company and not the liability insurer (A151). Home was under no obligation to employ his firm and never, to his knowledge, had it been employed in any liability or casualty type case. Home has other counsel in Kansas City in those cases (A152-153). Risjord and his firm have never represented Home Insurance Company in any subject matter related to litigation, and it never represented Firestone Tire & Rubber Company as their insured by Home (A154).

The trial court made the following findings of fact in the second pre-trial order of August 10, 1979 (A157-158):

1. For the past several years, and until the present time, Mr. Risjord's law firm has included Home Insurance Company in its list of clients published in the Martindale-Hubbell Law Directory;

2. During the past several years Mr. Risjord's law firm has represented Home Insurance Company in litigation that was not related to this pending case;

3. Neither Mr. Risjord nor his law firm has ever represented Home Insurance Company in litigation that is related to this pending action;

4. Home Insurance Company does not pay a retainer fee to Mr. Risjord or to his law firm, but does employ his law firm from time to time on a case-by-case basis;

5. Mr. Risjord's firm was employed in January, 1974, to represent Home Insurance Company in a suit on a fire insurance policy, which suit is presently pending in the Circuit Court of Jackson County, Missouri;

6. In at least two of the cases consolidated into this multi-district proceeding, Mr. Risjord represents plaintiffs who have named Firestone as a defendant in their case; and

7. Home Insurance Company is the liability insurance carrier who insures Firestone against excess liability in two cases in which Mr. Risjord's clients have sued Firestone.

Based upon these findings, the court ruled that Risjord could avoid the conditional granting of disqualification by either withdrawing from the case in which he represented Home or by written consent of his clients and the Home in these damage suits (A155, A160).

Risjord filed a report to the court on August 28, 1979 containing the consents of the four plaintiffs and of Home (A167-183). All plaintiffs were informed of (1) Risjord's representation of Home in the *Cannova* lawsuit; (2) the listing of Home in Martindale-Hubbell; (3) the handling of cases for Home on a case-by-case basis for many years; and (4) that Home Insurance Company or affiliated companies may have an interest in the outcome of the case against Firestone because of the excess liability policy issued by Home to Firestone. With this knowledge, all plaintiffs signed a consent that Risjord continue to represent their interest against Firestone (A173-183). The Butler, Goodwin and Rodriquez affidavits also contained the consent

and approval of referring counsel, acknowledging that the affidavit and consent had been fully explained to the clients who gave their approval and affirmation (A175, A178, A183).

Home's consent was signed by Larry Wagner, Assistant Secretary. Wagner's affidavit stated the only case handled by Risjord was the *Cannova* case against several companies on fire policies, in which Home Insurance Company has 10% of the total coverage. At no time has the Risjord firm received information directly or indirectly from Home regarding Firestone Tire & Rubber Company, nor been employed to represent directly or indirectly Firestone with respect to the excess policy of Home issued to Firestone. Home was informed that Risjord represented plaintiffs against Firestone in the Butler, Goodwin, Hale and Rodriquez cases. Home consented to the continued representation of Home in the *Cannova* case (A170, A172).

Home instructed Risjord to withdraw from its representation in the *Cannova* case on November 6, 1979, because of the filing of a suit by Firestone against Home, and the considerable expenditure of time and money in it and in MDL 362 arising from Risjord's continued representation in the *Cannova* case. The letter again affirmed that the Risjord firm had not had access to nor will it ever have access to information that Firestone made available to Home (A192).

Risjord withdrew from representation of Home in the *Cannova* case on November 7, 1979 (A190), and filed with the district court an affidavit containing the letter and withdrawal (A188-189).

Firestone filed an action against Home in the United States District Court for the Western District of Missouri on October 25, 1979 based upon the Risjord representation. Firestone pleaded that Risjord represented Home in

at least one matter "unrelated to Firestone or wheels and rims" (A217, A219). Firestone filed a motion to hold Risjord in contempt on October 5, 1979, for failure to satisfy the conditions (A186-187) and later withdrew this motion (A194).

Risjord's discovery activities have resulted in an order from the District Court for the District of Columbia making available the Watergate documents with relation to the "political slush fund" theories asserted against Firestone and certain of the other defendants (Supp. Record Ex. D).

The district court certified its order under 28 U.S.C. § 1292(b) (A161). Firestone's notice of appeal was filed September 11, 1979 (A184-185) without seeking permission from the Court of Appeals (A201). Risjord's motion to dismiss the appeal was overruled, and the Court of Appeals for the Eighth Circuit ruled the issue of appealability under 28 U.S.C. § 1291 prospectively, and decided the case on the merits (A200-3).

SUMMARY OF ARGUMENT

I.

Orders denying disqualification of an attorney should not be appealable and the Court of Appeals for the Eighth Circuit properly so ruled in this case (A201-203, 612 F.2d 377).

In the last several years a growing number of circuits have ruled that such orders are not appealable.

The Court of Appeals for the District of Columbia carefully reviewed the experience of the other circuits, and the requirements of *Cohen v. Beneficial Industrial Loan Corp.*, 377 U.S. 541 (1949), and so ruled in *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (1976). The Sixth Cir-

cuit in *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (1979), relying on *Community Broadcasting,* overruled its former position and agreed that such orders were not appealable. The decision of the Eighth Circuit in this case followed shortly thereafter.

Firestone designates *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corporation,* 496 F.2d 800 (2nd Cir. 1974), as the leading case that orders denying disqualification of attorneys are appealable. *Silver Chrysler* was overruled by the Second Circuit in *Armstrong v. McAlpin,* ..... F.2d ....., No. 79-7042, on June 20, 1980.

The decisions rejecting the rule of appealability have held that the collateral order doctrine of *Cohen* (377 U.S. 541) is not met where there are orders refusing disqualification. Such cases do not involve issues of importance as defined by *Cohen,* as disqualification cases turn on the facts of a particular case and do not ordinarily involve principles of law or matters of public importance. Normal appellate processes are adequate to vindicate this interest, as they have been in the related but more serious situation where a District Judge has denied a motion for recusal. Further, the harm caused by erroneous denial does not create irreparable injury because the court retains its power to grant a new trial, or issue protective orders. *Community Broadcasting,* 546 F.2d at 1028, *Melamed,* 592 F.2d 296 and *Armstrong, supra,* at 11 and 12.

Appeals under 28 U.S.C. § 1291 were contrasted with those of 28 U.S.C. § 1292(b) by this Court recently in *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). This Court ruled unanimously, speaking through Mr. Justice Stevens, that the denial of certification of a class involved a case by case analysis of the facts, and denied appealability, distinguishing other decisions in which questions of public importance have been presented. Class action de-

terminations were said not to differ from other orders such as those involving discovery, venue or summary judgment.

Disqualification cases present another example of case by case analysis of the facts, and most of the Courts of Appeals have recognized the broad discretion placed in the district court and held that such decisions should not be overturned except for abuse of discretion.

Appeals of right from disqualification refusals thrust appellate courts distinctly into the trial processes and upset the balance between the function of the courts as established by the Congress (*Coopers & Lybrand v. Livesay*, 437 U.S. at 476).

The decisions of the Courts of Appeals rejecting appealability have observed the use and abuse of disqualification motions as a tactical weapon that are often simply disguised harassment and an instrument of delay. *Community Broadcasting*, 546 F.2d at 1027, *Melamed*, 592 F.2d at 295. The Second Circuit particularly has been plagued with a number of appeals on this question and the majority opinion in *Armstrong v. McAlpin* pointed to a substantial number of appeals that have resulted from this rule, which were not altogether reflected by reported decisions.

In this case, the District Judge certified the disqualification issue as appealable under 28 U.S.C. § 1292(b). Firestone did not obtain an order from the Court of Appeals permitting the appeal, and appealed directly under 28 U.S.C. § 1291. Firestone should suffer the same fate as the appellant in *Coopers & Lybrand v. Livesay*, who did not request such certification even in the district court, but appealed under § 1291 and saw the appeal dismissed.

II.

An Order refusing disqualification of Risjord was based on findings of fact by the District Judge and his exercise of discretion. The Court of Appeals ruled that the District Court did not abuse its discretion in refusing to disqualify Risjord (A157, 200).

Disqualification cases uniquely involve broad discretion in the District Judge (*Waters v. Western Co. of North America,* 436 F.2d 1072 [10th Cir. 1971]), and this makes particularly appropriate this Court's rule that except in most exceptional circumstances it will decline review where two courts below have passed on findings of fact. *Branti v. Finkel & Tabakman,* ..... U.S. ....., 63 L.Ed.2d 574, 580 (1980); *Graver Tank & Manufacturing Company v. Linde Air Products Company,* 336 U.S. 271 (1949). Under similar circumstances the Court has ruled that the issuance of the writ of certiorari was not warranted. *Rudolph v. United States,* 370 U.S. 269, 270 (1962).

III.

Firestone has never been a client of Risjord. Firestone's entire argument of conflict of interest is based on Risjord's representation of Home in a fire insurance case the District Court found to be unrelated to the rim cases against Firestone (A154, 157). There is no evidence that Home has disclosed any information on the rim cases to Risjord (A171, 192).

Firestone, never a client of Risjord, has no standing to attempt to disqualify Risjord and no interest that is protected under DR5-105. The excess policy under which Home insures Firestone, but has no duty to defend it (A234), creates no relationship that gives Firestone standing to disqualify Risjord. Home is a large insurer, writing many lines of insurance, and its consent to Risjord's rep-

resentation of the plaintiffs is understandable because there is no relationship between the rim cases and the fire case.

The District Court's ruling that consents from Home and the plaintiffs would dispel any adverse effect on Risjord's exercise of independent judgment on behalf of his clients was proper under DR5-105(C) and *International Business Machines Corporation v. Levin,* 579 F.2d 271 (3rd Cir. 1978). Disclosing to Home and plaintiffs the facts of representation of the other, much as set out in the findings of the Court in its order, Risjord obtained consents of Home and the plaintiffs (A167-183), which satisfied the Court's Order.

Great discretion should be placed in the District Judge because appearances may be misleading and what may appear to be a conflict of interest can be no conflict at all or so insignificant as to be overcome by other circumstances. *Waters v. Western Co. of North America,* 436 F.2d 1072 (10th Cir. 1971). This observation is particularly significant in this case, as the District Court had all of the facts before it when it made its ruling, and not just the few that Firestone has chosen to present to this Court.

After Risjord's later withdrawal from the *Cannova* litigation, and its dismissal, Risjord no longer represents Home (A188, Supp. Rec., Ex. C). Withdrawal from representation of one party or dismissal of the case eliminated any need for disqualification in two recent cases in an insurance setting, *Moritz v. Medical Protective Company of Fort Wayne, Indiana,* 428 F. Supp. 865 (W.D. Wisc. 1977); *Wong v. Fong,* 593 P.2d 386 (Haw. 1979).

Risjord has been a vigorous advocate in behalf of plaintiffs, and was selected as lead counsel for plaintiffs in the multi-district litigation. He has had substantial success in rim cases against other manufacturers, and publicity from this was urged unsuccessfully as a ground of dis-

qualification (A69-70). There are strong policy interests in the client being represented by counsel of his choice, and to allow disqualification where there is no direct relationship is not justified. Firestone's argument, based on the placement of the listing in Martindale-Hubbell, and the allegations of the intentional tort theory without informing this Court of other pleaded grounds of negligence and liability under *Restatement of Torts,* § 402A, is insufficient to justify disqualification.

Use of motions to disqualify is an abused tactical tool. *Melamed* (592 F.2d at 295) and *Armstrong* (*supra* at 9). Firestone, giving this Court only part of the facts, and by speculation and innuendo suggesting a factual situation unsupported by the record, should not obtain disqualification of a vigorous opponent.

ARGUMENT

I. On Order Denying a Motion to Disqualify Counsel on Ethical Grounds Is Not a Final Appealable Order Under 28 U.S.C. § 1291.

The Court of Appeals for the Eighth Circuit correctly held that an order denying disqualification of counsel is not appealable under 28 U.S.C. § 1291. In so holding the Court overruled its previous decisions and joined the more recent and better reasoned decisions of the Courts of Appeals for the D.C., Sixth, and Ninth Circuits now joined by the Second Circuit.

Firestone has argued that the order of the District Court refusing to disqualify Risjord is an appealable final decision under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The *Cohen* collateral order doctrine was recently considered by this Court in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978). The Court, speaking unanimously through Mr. Justice Stevens, held that an

Order refusing to certify a class was not appealable under the *Cohen* doctrine, nor under a "death knell" doctrine that had been adopted by several of the circuits in such cases. The Court made clear that the *Cohen* exception applies to a small class of decisions, and gave the reasoning for such ruling in the following footnote citation from an earlier opinion of Mr. Justice Frankfurter, 437 U.S. at 467 n. 8:

> "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piece-meal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component element in a unified cause." (From *Cobbledick v. United States*, 309 U.S. 323 (1940)).

It is this recognition of the crippling effect on judicial efficiency of piece-meal review that has prompted the current trend in the circuit courts of appeal toward restricting immediate appeals from orders denying disqualification of counsel to those orders that are certified as appropriate for appeal under 28 U.S.C. § 1292(b). *See Armstrong v. McAlpin*, No. 79-7042, slip op. at 10 (2nd Cir. June 20, 1980); *Melamed v. ITT Continental Baking Company*, 592 F.2d 290, 295 (6th Cir. 1979); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1023 (D.C. Cir. 1976).

On June 20, 1980 the Second Circuit, overruled *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (1974) in *Armstrong*. The *Silver Chrysler* decision had provided the basis for the current positions of the Fourth and Seventh Circuits on the appealability of such orders. *See MacKethan v. Peat, Marwick, Mitchell & Co.*, 557 F.2d 395 (4th Cir. 1977); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). *Silver Chrysler* had also been relied on by the Fifth and Tenth Circuits in support of their decisions on appealability. See *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), (although this question is presently before the Court of Appeals from the Fifth Circuit, en banc, in *Abraham Construction Corporation v. Armco Steel Corporation*, 79-2007, but has not yet been ruled, *Church of Scientology of California v. McLean*, 615 F.2d 691, 692 (1980)); *Fullmer v. Harper*, 517 F.2d 20 (10th Cir. 1975).

The Courts that have recently reviewed appealability of orders denying disqualification have recognized the abuse of such orders (which we will presently discuss, I C) and consider whether the *Cohen* criteria applied in such cases.

Under *Cohen*, for an interlocutory order to be appealable under 28 U.S.C. § 1291, the order must (1) involve issues collateral to the merits of the action, (2) dispose conclusively of the disputed question, (3) resolve an important issue which does not merely involve the exercise of discretion, and (4) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). An order denying a motion to disqualify counsel on ethical grounds does not meet the *Cohen* requirements.

A. An order denying a motion to disqualify counsel does not resolve important legal issues but rather involves a case by case exercise of discretion.

Interlocutory appeal under 28 U.S.C. § 1291 is necessarily inappropriate where the decision appealed from involves an exercise of discretion based on the facts of the case. In *Coopers & Lybrand v. Livesay* this Court, speaking unanimously through Mr. Justice Stevens stated (437 U.S. at 436):

> "* * * [A]llowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving.' "
>
> Quoting *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2nd Cir. 1975).

Most disqualification motions are decided on the basis of primarily factual determinations. *Armstrong, supra,* at 12; *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 (2nd Cir. 1977). Moreover, it is generally held that decisions on disqualification motions are to be left to the discretion of the district court. *See e.g., Central Milk Producers Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978); *Gas-A-Tron of Arizona v. Union Oil Company of California*, 534 F.2d 1322, 1325 (9th Cir. 1976); *Hull v. Celanese Corporation*, 513 F.2d 568 (2nd Cir. 1975) (Br. III E). The district court is vested with such a broad grant of discretion because only the trial judge is in a position to separate apparent unethical con-

duct from actual improprieties that pose a threat to the integrity of the trial process and therefore require disqualification. *Waters v. Western Company of North America*, 436 F.2d 1072, 1073 (10th Cir. 1971). Thus, allowing interlocutory appeal as of right from denials of disqualification motions frustrates the final-judgment rule purpose of preserving the integrity as separate entities of the various courts that make up the federal judiciary. *Coopers & Lybrand v. Livesay, supra*, at 476.

This Court in *Cohen* was clear that not every order fixing security was subject to appeal, particularly where it involved an exercise of discretion as to the amount. "* * * Here it is the right to security that presents a serious and unsettled question. * * *" (337 U.S. at 547).

Thus, "another important factor bearing on the application of the *Cohen* doctrine . . . is whether a decision will settle a point once and for all, as it did in the *Cohen* case, or will open the way for a flood of appeals concerning the district court's ruling on the facts of a particular suit." *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2nd Cir. 1972). It was on this basis that this unanimous court in *Coopers & Lybrand, supra*, carefully distinguished *Gillespie v. U.S. Steel Corporation*, 379 U.S. 148 (1964), noting that *Gillespie* had "disposed of an unsettled issue of national significance." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n. 30.

The particular issues involved in each case dealing with attorney disqualification cannot be considered to be important from the standpoint of setting down clear rules which can be followed in similar cases by other courts. *See Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027 n. 38 (D.C. Cir. 1976); *Grinnell Corp. v. Hackett*, 519 F.2d 595, 597-598 n. 4 (1st Cir. 1975). The flood of appeals noted by the Second Circuit as a result of its

Silver Chrysler decision is evidence that no particular decision on a disqualification issue is likely to settle a potentially recurring question once and for all. *See Armstrong v. McAlpin, supra,* at 9, 10; *Allegaert v. Perot,* 565 F.2d 246, 247 (2nd Cir. 1977); *Eckles v. Furth,* 557 F.2d 953, 954 (2nd Cir. 1977); *International Electronics Corporation v. Flanzer,* 527 F.2d 1288, 1289 (2nd Cir. 1975).

Orders denying motions to disqualify counsel do not involve the existence of the disciplinary rules, or an important legal issue, but rather application of the rules on a case by case basis which of necessity involves the exercise of discretion. Such issues do not satisfy *Cohen* criteria.

B. Review after final judgment of an order denying motion to disqualify counsel does not present a danger of irreparable harm, except in extraordinary situations.

Orders denying disqualification of counsel do not satisfy the irreparable harm requirement of *Cohen. Armstrong* particularly found no irreparable damage because the Court retains its traditional power to grant a new trial if the District Court's ruling ultimately turns out to be incorrect, and the trial judge retains the power to protect the trial through protective orders or reconsideration of the need for disqualification. *Armstrong, supra,* at 11-12. The courts that have refused appealability of such orders have found that there was no claim of right that will be irreparably lost on appeal from final judgment in such cases. *Melamed,* 592 F.2d 296 and this case below (A202, 612 F.2d 378).

The argument that public confidence in the administration of justice will be irreparably harmed by delaying appeal until final judgment is no more persuasive in the attorney disqualification context than with other rulings that must await final judgment for correction.

All of the arguments that can be brought to bear in support of public policy and public confidence reasons for immediate appeal in disqualification of attorney cases apply with even more force in cases involving the recusal of the trial judge. No issue can be more critical to the integrity of the judicial process than those raised in recusal motions. Yet the Courts of Appeals have concluded that there is not such a danger of irreparable harm associated with denial of recusal motions as would justify application of the *Cohen* doctrine thereto. *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 960-961 (5th Cir. 1980); *United States v. State of Washington,* 573 F.2d 1121, 1122 (9th Cir. 1978); *Rosen v. Sugarman,* 357 F.2d 794, 796 (2nd Cir. 1966).

In discovery orders as well as recusal, the remedy of reversal after final judgment upon a showing of prejudice has universally been held to be an effective safeguard against the possibility of irreparable harm. *See e.g., United States v. State of Washington,* 573 F.2d 1121 (9th Cir. 1978) (recusal motions); *Baker v. United States Steel Corporation,* 492 F.2d 1074 (2nd Cir. 1974) (discovery orders). That remedy must also be viewed as an effective safeguard against irreparable harm in the attorney disqualification context.

In *Coopers & Lybrand v. Livesay,* 437 U.S. 463, this Court was faced with the issue of whether a district court's class action certification denial is a "final decision" under 28 U.S.C. § 1291. Under the "death knell" doctrine that issue was made to turn on the court of appeals' determination as to whether the individual claims involved in the underlying action were sufficiently small to effectively preclude the possibility that the action would be maintained in the absence of a class certification. This Court held that such case by case decisions on the issue of whether an interlocutory appeal may be had must be made

under § 1292(b). The Court noted that allowing such appeals to proceed under § 1291 frustrates the Congressional purpose reflected in the adoption of § 1292(b).

The similarity between class determinations and many interlocutory orders in ordinary litigation, such as discovery, venue and summary judgment insofar as appealability is concerned, was noted by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. at 470.

This Court has considered irreparable damage under *Cohen* in a criminal setting in *United States v. MacDonald*, 435 U.S. 850 (1978). The unanimous court speaking through Mr. Justice Blackmun, pointed to the difficulty in measuring prejudice in speedy trial claims before final appeal (435 U.S. 850, 861). Similarly the issue of prejudice or taint in disqualification denials can best be measured by appeal after trial. The *MacDonald* decision observed that the double jeopardy claims in *Abney v. United States*, 431 U.S. 651 (1977) and the reduced bail in *Stack v. Boyle*, 342 U.S. 1 (1951) as well as posting of security at issue in *Cohen* involved rights that would be destroyed if not vindicated before trial. These cases are cited by Firestone in its brief. This description does not fit in disqualification cases, and the *Cohen* doctrine is not applicable.

The Courts of Appeals for the Third, Sixth, Eighth, Ninth and D.C. Circuits have all recognized that in some extraordinary cases it is possible that irreparable harm will result from delaying review of denial of disqualification motions until final judgment. The response of the latter four courts to that recognition has been to allow interlocutory review of such orders only under 28 U.S.C. § 1292(b) or 28 U.S.C. § 1651.

Clearly the remedies under § 1292(b) and § 1651 are preferable in that they enable courts to pick and choose

particularly worthy cases from among the class. This is opposed to the position taken here by Firestone which would recognize a class of interlocutory orders as appealable under § 1291 which in turn would give litigants the opportunity to protract proceedings, burden the judicial system and impose costs and expenses on the opposing party. Permitting appealability of orders denying disqualification as a matter of right is so potentially dangerous that it must be rejected.

The Court in *Armstrong* found irreparable harm to be more of a factor in cases where disqualification was granted. That issue is not presented in this case, but the separation of a client from the attorney of his choice presents a substantially different question on this issue (*Armstrong, supra,* at 13-15).

Armstrong further pointed to the continuing authority of the trial court in disqualification denials. Protective orders are available, and there can be reconsideration of the need for disqualification. *Id.* at 11, 12. Conditions may change, such as occurred in this case with the withdrawal from the *Cannova* case by Risjord, and its dismissal. This situation is not unlike the motion to disqualify on speedy trial grounds considered in *United States v. MacDonald,* 435 U.S. 859. These observations are applicable not only to the issue of irreparable damage but finality of the Court's order.

C. Practical considerations of the abuse of disqualification motions require that denial of such motions be appealable only after final judgment.

The *Cohen* exception is given a practical rather than technical construction. Strong practical considerations are persuasive that denials of disqualification orders should not be appealable.

Abuse of motions to disqualify counsel is recognized by a number of the circuits. Motions to disqualify have become "common tools of the litigation process, being used * * * for purely strategic purposes," and "tactics of an adversary proceeding". *Allegaert v. Perot,* 565 F.2d 246, 251 (2nd Cir. 1977). Attorneys now commonly use disqualification motions for purely strategic purposes. *Woods v. Covington County Bank,* 537 F.2d 804, 813 (5th Cir. 1976). There is great possibility of abuse of such motions, *Melamed v. ITT Continental Baking Company,* 592 F.2d 290, 295 (6th Cir. 1979), and such motions frequently involve "disguised harassment", in which the Court of Appeals for the Eighth Circuit in this case below agreed (A201, 612 F.2d at 378). *Armstrong v. McAlpin,* ..... F.2d ....., 79-7042 (2nd Cir. June 20, 1980) observed the use of such motions for purely tactical reasons, such as delaying the trial (*Id.* at 9), and with *Community Broadcasting of Boston, Inc. v. F.C.C.,* 546 F.2d 1022 (at 1027), the deluge of appeals and the increase in numbers of such motions and delay. The abuse of such motions has thus been recognized by five of the circuits, and not just the student comment as Firestone in its brief would suggest. (See the well reasoned and documented note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts,* 45 U.CHI.L.REV. 450 (1978).)

The Second Circuit in *Armstrong* was concerned with the substantial increase in disqualification motions. Firestone criticizes this position. In replying to similar criticism voiced by a dissenting member of the Court, the *Armstrong* majority holds to the position that the motions have increased and that the number of published opinions is an inadequate measure of the prevalence of such appeals. *Id.* at 426 n. 9. The table attached as an addendum to this brief lists reported decisions on disqualification in all

the Circuit Courts of Appeals. It illustrates the impact on appellate dockets of disqualification motions.

Much of Firestone's criticism of *Armstrong* is contained in circuitous and ambiguous references to earlier parts of its own brief, but suffice it to say that the suggestions of alternative discretionary procedures in § 1292(b) or § 1651 have been recognized by the Court in *Coopers & Lybrand* as an essential element of preserving the congressional scheme of independence of the work of the trial and appellate courts, and by the Courts of Appeals in *Armstrong, Melamed, Community Broadcasting* and the Court below in this case.

Because of the serious and crippling delay engendered by the use and free appealability of such motions, practical considerations require that any interlocutory appeal from an order denying a motion to disqualify must be had pursuant to the discretionary certification procedures of § 1292(b). Turning on the facts as they do, only the discretionary procedures give the Courts of Appeals proper control over cases that should be heard.

II. The District Court and Court of Appeals Have Ruled Upon the Factual and Discretionary Issues Relating to Disqualification and Those Findings Should Not Be Disturbed by This Court.

The District Judge ruled the motion to disqualify, finding facts and exercising discretion. The Court of Appeals, after announcing its rule of appealability with prospective application, permitted the instant appeal, and concluded that the District Court did not abuse its discretion in refusing to disqualify Risjord (A203).

The factual issues in this case have thus been passed upon twice. Under similar circumstances, this Court has ruled that it should not reexamine the evidence and disturb these findings unless clearly erroneous.

The Court has recently stated in *Branti v. Finkel and Tabakman,* ..... U.S. ....., 63 L.Ed.2d 574 (1980), Note 6:

> "* * * In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the District Courts and Courts of Appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous * * *."

Graver Tank & Manufacturing Company v. Linde Air Products Company, 336 U.S. 271 (1949), frequently cited by this Court, sets out the rule as follows (336 U.S. at 275):

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error * * *."

In *Berenyi v. Immigration Service,* 385 U.S. 630, 635-6 (1967), the Court follows this rule, stating that it had no empirical expertise to set against careful and reasonable conclusions of lower courts on purely factual issues, and would not apply the exceptional doctrine sometimes invoked when constitutional claims are involved.

In *United States of America v. Oregon State Medical Society,* 343 U.S. 326 (1952), the Court found the rule appropriate where there was "a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses." So in this case, it is not evidence but unsupported arguments of Firestone that go into motives and purposes, and the net effect is to attempt to create by speculation and inference a question relating to the credibility of the parties.

The Court of Appeals for the Eighth Circuit "carefully reviewed" the record in the District Court (A203). The brevity of its opinion and the decision to omit oral argument undoubtedly reflect the views of the Court of Appeals as to the merits of Firestone's claim (*See Heaney, Appeals Process in the Eighth Circuit,* 78 F.R.D. 261, 262-3).

While Firestone complains that the Eighth Circuit considered the case on the merits, both the Sixth and Second Circuits in *Melamed* and *Armstrong* followed identical procedures. Firestone thus was given full consideration on the merits, and under the rules followed in this Court has had the review that would be granted should this Court determine that the disqualification issue is appealable. Firestone's argument that the prospective ruling robs the case of being a case in controversy, overlooks the fact that the Court of Appeals for the Eighth Circuit determined the entire controversy when it could have ruled on appealability only and determined that no review of the issue on the merits was necessary, as did this Court in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 477 (1978).

Broad discretion is placed in the District Judge in disqualification cases in weighing the facts and fashioning a remedy. See this Brief, III G. This rule fits hand in glove with the two-court rule discussed above.

Under circumstances similar to this, this Court has on several occasions determined that the issuance of the Writ of Certiorari is not warranted. *Rudolph v. United States,* 370 U.S. 269, 270 (1962).

III. The District Court Properly Permitted Risjord to Continue to Represent Plaintiffs in the Rim Cases With Consent of His Clients Under DR5-105(C), and His Later Withdrawal From the Home Fire Case and Its Dismissal Eliminate Any Claim of Conflict.

A. Firestone's argument is based on an abbreviated and incomplete statement of facts.

Firestone's Statement of the Case, Summary of Argument, and Argument are based on simplistically abbreviated facts that ignore most of the record that was the basis for the ruling of the District Judge.

The true nature of Risjord's representation of Home is ignored. Risjord represented Home, as one of six fire insurers against whom claim was asserted. This was his only case for Home in the last ten years, and his firm had a minimal number (A92, 94, 98). His representation and that of his firm have been in fire insurance matters, and not in liability insurance cases in which they have represented policyholders such as Firestone (A91, 95, 97, 99). The District Court found the litigation handled for Home was unrelated to the rim cases, and Risjord and his firm have not represented Home in litigation related to the pending action (A157-158).

Firestone makes no reference to the undisputed evidence that Risjord had furnished no information on the Multi-Piece Rim cases to Home and that Home had furnished no information to Risjord (A95, 172, 192).

Firestone does not inform the Court of the allegations in the complaints which are not only against Firestone, but other defendants, Goodyear, Budd and Kelsey Hays and which are based on defective products under *Restatement of Torts*, § 402A (A13, 29, 51, 63), and negligence, with

some ten pleaded failures that seem particularly appropriate in negligence actions (A15-16, 30-32, 52-53, 63-65), as well as the allegations of willful and intentional misconduct and fraudulent misrepresentation (A19-23, 33-38, 43-48, 55-60, 67-71). The denial or reservation of rights of Home goes only to the willful or intentional acts and punitive damages (A113-116, 198-199). The net result is that Home is accepting coverage on the claims of negligence and defective products.

Firestone does not mention that Risjord filed a complaint on behalf of another plaintiff against Goodyear alleging identical claims based on defective products and negligence, as well as intentional or willful misconduct or misrepresentations (A205-216). No reference is made to letters written by Home with relation to five non-Risjord lawsuits denying coverage because of allegations of intentional acts or misrepresentations, or willful acts or intentional concealment (A117-123).

Firestone refers on numerous occasions to the unsophisticated plaintiffs, and the consents they gave, but nowhere tells the Court that the three plaintiffs involved in Home insured cases were represented by referring attorneys who explained the affidavit and consents fully to their clients, obtained their approval, and themselves consented to the continued representation (A175, 178, 183).

These facts, together with Firestone's argument concerning Risjord's long-standing relationship with Home and the intentional tort theory and letters of reservation of rights (Br. 3-4, 33-34) were known to the experienced District Judge.

While omitting many facts that are in the record, Firestone by skillful argument weaving speculation, inference and innuendo together makes assertions of potential col-

lusion, that Risjord is influenced by Home's interest (Br. 11) in asserting theories helpful to Home (Br. 37), and that Home is determined to have Risjord as its ostensible adversary with the two appearing to act in tandem (Br. 44). These assertions are not supported by any evidence and are simply not true. The observation of the District Judge that he regarded many speculative matters as immaterial (A153) would apply to such statements.

B. There was no attorney/client relationship that gives Firestone standing to disqualify Risjord, and Risjord's representation of Home creates no conflict with Firestone.

Firestone has never been a client of Risjord (A154). Firestone is thus an unauthorized surrogate, having no standing to disqualify Firestone. *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 88 (5th Cir. 1976), the court states:

> "As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification. [Citing cases]."

The *Yarn Processing* case further states at p. 90:

> "To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist."

This rule was applied by the Missouri Court of Appeals for the St. Louis District in *Payne v. St. Louis Grain Corporation,* 562 S.W.2d 102 (1977). The District Court in Rule 43 (IV)(B) has adopted the Code of Professional Responsibility of the Missouri Supreme Court, and this case is persuasive. There the lawyer had represented St. Louis Grain, and in the case in question was represent-

ing Westchester, one of St. Louis Grain's two insurers involved in dispute as to coverage. Second insurer moved to disqualify and the court stated (l.c. 106):

> "It appears to us that appellant Commercial has no standing to raise this issue. 'The objection that an attorney is disqualified by reason of his representing adverse interests is available only to those as to whom the attorney in question sustains, or has sustained, the relation of attorney and client.' [Citing *Yarn Processing* and other cases]."

Firestone's fragile position, when all the semantic gloss is stripped aside, is that Risjord should be disqualified because he was lawyer for a group of six fire insurers, including Home, in the *Cannova* litigation which is "unrelated to Firestone or wheels and rims" (A219). Home is not a party to the rim litigation but provides excess insurance over $500,000 with Firestone having the contractual obligation to defend itself (A92, 154, 234). Risjord and his firm have never represented Home in litigation related to the pending case (A157). Neither Risjord nor Home has furnished information to the other concerning the Multi-Piece Rim case (A95, 171, 192).

Firestone has cited no authority that under the circumstances which were before the District Judge in this case, Risjord had any relationship with Firestone that required either consent from Firestone or Risjord's disqualification. The District Judge ruled that consents from the plaintiffs and Home, or withdrawal from representation of one or the other, would dispel any concern about adverse effect on the ability of Risjord to exercise independent judgment (A153-155, 160).

Firestone, never a client of Risjord, has no basis to assert DR5-105 on its own behalf. The essence of Canon 5 and the potential danger it is designed to guard against is

failure of an attorney to represent one client properly because of a relationship with another client whose interests are in conflict with that of the first. It is the client, Home, and not an adverse third party who may have a contractual relationship with it such as an excess insurance policy, that is protected. DR5-105(A) and (B) defines such conflicts and DR5-105(C) allows representation with consent of the clients. Conflict between *clients* is the subject of the rule. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 90 (5th Cir. 1976); *International Business Machines Corp. v. Levin*, 579 F.2d 271, 282 (3rd Cir. 1978).

Firestone's position is that with no direct relationship with Risjord, Firestone should have a right to consent to the representation of plaintiffs asserting the claim against Firestone because of Risjord's representation of Home in totally unrelated matters. Firestone would stretch the Code of Professional Responsibility beyond all limits of reason. There is nowhere any intention that a party in litigation has to approve counsel for his opponent, and such a position runs directly contrary to the letter and spirit of the rules.

Firestone's entire argument is based upon the ambiguous word *all* as it appears in *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2nd Cir. 1976), which it quotes repeatedly. However, the explicit language of DR5-105(C) and EC5-16, provides that clients, and not an outside party, must consent, and the *all* in *Cinema 5* refers to clients. Both DR5-105, relied upon by the District Court, and EC5-16 refer to representing interests of *"each client"* and that *"each client"* must consent. *E.g., International Business Machines v. Levin*, 579 F.2d 271 (3rd Cir. 1978); *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Messing v. FDI, Inc.*, 439 F. Supp. 776 (D. N.J. 1977). The step from *each client* to *all persons*

is simply another symptom of the overbroad and misleading arguments made by Firestone.

Firestone cannot demonstrate conflict. Its singular quotes from *Matter of Kelly v. Greason,* 23 N.Y.2d 368, 296 N.Y. Supp. 2d 937, 244 N.E.2d 456 (1968), are simply not applicable. Here one member of a law partnership was an adjuster for Nationwide Insurance Company and the partnership handled claims against Nationwide and in one instance the claim was actually handled by the partner adjuster. Similarly, *Holloway v. Arkansas,* 475 U.S. 435 (1978), is distinguishable because it involves an attorney appointed to represent three criminal accuseds.

Home's excess insurance policy covering Firestone gives Firestone no basis to raise the claim of conflict. The Home excess policy places the duty to either settle or defend lawsuits on Firestone (A23, 34). This differs from many liability policies where the insurer agrees to provide a legal defense to suits against the policyholder, which creates an attorney/client relationship between the lawyer and insured as in *Tomerlin v. Canadian Indemnity Company,* 61 Cal.2d 638, 39 Cal. Rptr. 731, 394 P.2d 571 (1964), cited by Firestone. *Tomerlin* is distinguishable since the lawyer had two clients, insurer and insured, with conflicting interests relating to the same case.

The absence of the duty to defend by the insurer is of critical importance since Firestone frequently argues the fiduciary relationship of Home. It has been held that where there is no exclusive right to defend or settle, there is simply a debtor-creditor relationship rather than a fiduciary relationship. *Craig v. Iowa Kemper Mutual Insurance Company,* 565 S.W.2d 716, 723 (K.C. Mo. App. 1978) and *Chavez v. Chenoweth,* 553 P.2d 703 (N.M. 1976) and *Couch on Insurance 2d* § 23.11. If there are problems arising out of the relationship between Firestone and Home,

Firestone has instituted litigation on the subject (A217) and these issues can be decided in that litigation.

Insurance companies frequently find themselves involved in lawsuits where they insure two or more parties in the same occurrence, and must provide separate representation with full disclosure (See *"Conflicts of Interest in Defending Insurance Cases," Conflicts of Interest in Practice,* The Defense Research Institute, 1971, Vol. No. 5, p. 22; *Guiding Principle VIII* cited therein at pp. 33-34, and in Martindale-Hubbell Law Directory, Vol. VII, 1978, p. 77M; and Annot. 18 A.L.R.3d 482 (1968). In this case, we are not dealing with two policyholders involved in the same dispute. The fire policy issued to *Cannova* by Home and the excess liability policy issued by Home to Firestone provide insurance coverage for two different kinds of risks that are not related in any way.

Home is one of the largest insurers in the United States. A recent comparison ranks Home as thirteenth in the nation in premium volume, which was in excess of 1.6 billion dollars per year. 81 *Best's Review, Property/Casualty,* June 1980, p. 10. Home writes 12 types of insurance coverage for which underwriting results are separately calculated, including fire and miscellaneous liability, and maintains service and claim offices in over 100 principal cities in the United States and Canada. *Best's Insurance Reports, Property-Casualty,* 1979, 627-8. These published reports do not indicate the number of policyholders with Home, but it is obvious that the number is most substantial. Firestone's position, simply put, is that any lawyer that has ever represented Home in an unrelated matter would be disqualified from filing suit against any of Home's thousands of policyholders.

The fact that Home has a monetary interest in excess exposure of Firestone gives Firestone no right to disqualify

Risjord, nor would it give the right to disqualify the other lawyers over the United States who may have represented Home in totally unrelated ltiigation. Home has not objected, and Firestone has no right to do so.

C. The requirements of Canon 5 and DR5-105 (A)-(C) have been satisfied by the court's requiring the consents of Home and plaintiffs which are fully adequate.

The action of the District Court that Risjord not be disqualified in the Firestone cases if he obtained consents from Home and plaintiffs was clearly authorized under DR5-105.

The District Judge found consent to be a proper approach based upon *International Business Machines Corporation v. Levin*, 579 F.2d 271 (3rd Cir. 1978). Here, the Carpenter firm (CBM) represented Levin in an antitrust case against IBM and had represented IBM in labor and replevin cases. The court in *Levin* disqualified CBM, and this order was affirmed.

The *Levin* decision underscores the wide discretion of the district judge in framing sanctions that will be just and fair to all parties involved (l.c. 279) and approved the trial court's findings stating (l.c. 281):

> "These findings, with which we agree, support the district court's conclusion, which seems to us reasonable and just, that CBM was obligated in these circumstances at the very least to disclose fully to CBM the facts of its representation of the plaintiffs and obtain its consent."

Consent as a viable alternative under DR5-105 is recognized. Unlike the present case there was no adequate disclosure of the conflict of IBM, there was disputed testimony

concerning the issue of consent, and there was specific objection by IBM (l.c. 282).

The *Levin* case does differ significantly from Risjord's representation of Home in that in *Levin* there was a pattern of repeated retainers, including several immediately before and four after the filing of the case. The ongoing and repeated instance of a relationship went far beyond the now terminated representation of Risjord. Further *Levin* involved a client, IBM, and not an insurer, with only a contractual insurance relationship with the client.

Nevertheless, the *Levin* case fully supports the action taken by District Judge Collinson. Based upon the facts before it, and *Levin,* the District Court determined that simultaneous representation by Risjord of Home in the unrelated *Cannova* litigation and of the plaintiffs in the rim cases could be undertaken with consent after full disclosure, and this would dispel any adverse effect on Risjord's exercise of independent professional judgment on behalf of each client (A153-155, 160).

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2nd Cir. 1976) and *Matter of Kelly v. Greason,* 23 N.Y.2d 368, 296 N.Y. Supp. 2d 937, 244 N.E.2d 456, 460, 461 (N.Y. 1968), relied upon by Firestone, demonstrate that representation of opposing parties may be undertaken with the knowledge and consent of those involved. This is exactly what Judge Collinson required as one of the alternatives, and the consents were properly filed. In *Cinema 5* the lawyer with the conflict, Fleischmann, offered to withdraw from one of the cases, but the offer was not accepted, and the court concluded he continued to have one foot in each camp (*Id.* at 1387). Just as the Courts in *Levin* and *Cinema 5* upheld the exercise of discretion of the District Judge, so this Court should uphold the ruling of Judge Collinson

which has now been complied with, both by withdrawal and consent.

Firestone is eager to accept the provisions in DR5-105(A) and (B) and the District Court's findings relating to Risjord's exercise of independent professional judgment. Firestone, however, prefers to ignore the provisions of DR5-105(C) providing that consent makes possible representation of those clients. Any possible conflict was between Home and the plaintiffs in the rim litigation, and under these circumstances it is obvious that Risjord could continue in his representation of each with consent. By arguing that the existence of a potential for conflict compels disqualification without reference to the application of DR5-105(C) and its consent provisions, it is Firestone that would limit the working of this rule, to its own advantage, just as it limits the evidence that it is willing to discuss with the Court.

Firestone is urging a conflict of interest that is far more technical than actual based on Risjord's representation in the totally unrelated fire case. *Acorn Printing Company v. Brown*, 385 S.W.2d 812, 817 (Spr. Mo. App. 1964). That court recognized that disclosure and consent of the parties being represented would satisfy any objection of conflict and pointed out that the injured party Acorn was not complaining.

In *Messing v. FDI, Inc.*, 439 F. Supp. 776 (D.N.J. 1977), representation of both outsiders and insiders in a corporate derivative action was seen as a "real potential for conflict," but the court determined that the disclosure requirements of DR5-105 would be fulfilled if disclosure affidavits and agreement to continued representation were submitted to the court. *Id.* at 784. *See also, In re Yarn Processing Patent Validity Litigation, supra.*

D. The consents filed by Risjord are fully adequate to satisfy the court's order and the requirements of DR5-105(C), and Firestone did not question their adequacy before appeal.

Firestone did not call to the attention of the trial court the adequacy of the consents before the appeal was filed and did not seek relief from the District Judge. Firestone filed its Notice of Appeal on September 11, 1979 (A184-185) after Risjord had filed his report containing the consents on August 28, 1979 (A167-183). The only time that the nature of the consents was called to the attention of the trial court was a motion for contempt filed October 5, 1979 (A186-187) which was later withdrawn November 30, 1979 (A194). Under these circumstances Firestone cannot ask this Court to pass upon the adequacy of the consents when the District Judge was not asked to do so. Firestone sought a finding of fact in the first instance from the Court of Appeals, and now from this Court.

The consents speak for themselves and make full disclosure of the potential conflict that troubled the court, and each of the parties consented to continued representation.

Home, by its assistant secretary, Larry Wagner, confirmed that he knew of Risjord's representation of the plaintiffs in the Firestone cases and agreed to the continued representation of Home's 10% interest in the *Cannova* fire case (A170-172). Home, after all, would have no way of consenting to Risjord's continuing representation of the individual plaintiffs. Only the plaintiffs could give such consent. Home's consent is fully adequate to comply with the order of the District Court. This consent was in full force until Risjord was notified to withdraw by Home and did so (A191-193, 190).

The nature of Risjord's representation of Home undoubtedly bears upon Home's consent. Risjord's work for Home had been in fire insurance cases. He had not represented Home's policyholders in litigation for 19 or 20 years, and he is not aware that his law firm has, although he stated that was possible (A95, 99). He had made a number of claims against Home policyholders (A97). Risjord's confusion as to the fire company and the liability company may not be in accord with the corporate technicalities (see *Best's Insurance Reports, Property-Casualty,* 1980, pp. 625, 626), but he was definite about the nature of the fire work that he had done for Home.

The Home consent is understandable under this reasoning from *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 89 (5th Cir. 1976):

> "A former client may consent to the employment of the attorney by an adverse party even where the former client is involved in the case as a party. In Consolidated Theatres v. Warner Bros. Circuit Management Corp., 216 F.2d 290, 296 (2nd Cir. 1954), the court explained that this might typically occur where the former client realizes that any prior disclosures will not prejudice him in the new case. Such consent will prevent the disqualification of the attorney even in a criminal case."

Similarly, all of the individual plaintiffs in their affidavits acknowledged the Risjord firm's listing of Home in Martindale-Hubbell and that it has handled litigation for Home. All acknowledged Home had an interest in the outcome of their case against Firestone because of the excess policy. With this knowledge of the relationship of Risjord to Home, each consented that Risjord should continue his or her representation (A173-183). While Firestone dwells upon the consents from the unsophisticated clients (Br.

36), it nowhere mentions that in Butler, Goodwin and Rodriquez referring counsel had fully explained the consents to the clients, and the clients agreed (A175, 178, 183).

With this knowledge, these plaintiffs could consent to Risjord's continuing representation in their case, but would have no right to consent on behalf of Home. It is the knowledge of Home's role in the case that gives rise to the need for consent of plaintiffs, and this consent was properly given.

Firestone's argument as to the inadequacy of information given to the plaintiffs or to Home is belied by the language of the consents which follows the findings of fact the District Judge found significant, as well as the extensive argument by Firestone in its brief, which simply underscores the adequacy of the information given and the consent taken (Br. 42). The consents obtained by Risjord were proper in every way in spite of the objections now raised by Firestone.

E. Risjord's termination of representation of Home conclusively eliminates any question of conflict.

While the consents should end the inquiry, the situation that has come before this Court has not been a static one. Risjord's representation of Home has terminated, the *Cannova* litigation concluded, and Home is now a former client of Risjord. During that representation, there was no exchange of information related to the rim cases.

Two cases in an insurance setting support the District Court's ruling and are particularly applicable in view of Risjord's withdrawal from representation of Home and the complete disposition of the *Cannova* case. In *Moritz v. Medical Protective Company of Fort Wayne, Indiana*, 428 F. Supp. 865 (W.D. Wisc. 1977), Medical Protective hired

Liddle to defend its insured Moritz in a malpractice case filed by Jacobsen. Moritz told Liddle he was contemplating suit against Medical Protective because of its failure to appeal an earlier Scofield case (defended by other attorneys selected by Medical Protective), and when he did so Liddle was assigned defense of this case. Liddle decided to accept this assignment and to withdraw from defense of the Jacobsen case.

The Court ruled that the subject matter of the Jacobsen malpractice case was not related to the dispute between Moritz and Medical Protective over the failure to appeal the earlier Scofield case, and therefore Liddle was not required to decline the employment offered by Medical Protective. The Court considered the responsibility of Liddle under Canons 4, 5 and 9 with provisions identical to Missouri and ABA Codes and overruled a motion for disqualification on the condition that Liddle and his firm withdraw as attorneys for Moritz in the Jacobsen case (428 F. Supp. at 875-6).

A similar case is *Wong v. Fong,* 593 P.2d 386 (Haw. 1979). Here the Fujiyama firm represented Dr. Wong in a malpractice case and during part of the same period represented Transportation Lease Hawaii, Ltd. in a separate action for damages against Dr. Wong, based on Wong's liability as a guarantor of performance of Penn. After the question of conflict of interest was raised, the Fujiyama firm was willing to withdraw as counsel for Wong in the malpractice action and a petition was filed to disqualify the firm in the Trans Lease case.

Citing the cases chiefly relied upon by Firestone in its brief (*Cinema 5* and *Matter of Kelly, supra*), the court found that with settlement or dismissal of the malpractice case and the fact that the Fujiyama firm had not acquired any confidential or prejudicial information during the at-

torney-client relationship with Wong, as here (A95, 172, 192), no harm could have been suffered by Wong. The concerns relating to the vigor and independence of representation did not apply once the relationship with Wong had been terminated by Fujiyama.

Firestone in its brief urges that Risjord's withdrawal and later the dismissal of the suit are of no moment (Br. pp. 3-4, notes). *Moritz* shows the significance of the withdrawal and *Wong* the termination of the relationship. *Wong* further pointed to the waste that would be involved in replacing counsel, which is a significant concern in our case because Risjord is lead and liaison counsel in the multi-district litigation.

Wong and *Moritz* present an even closer relationship for the attorneys were hired by insurers with contractual duty to provide a defense to represent the insured, Moritz and Wong, and accordingly a direct attorney/client relationship existed between the lawyers and the insured client. In our case, any representation of Home was totally unrelated and created no attorney/client relationship between Risjord and Firestone. Other cases with closer relationships finding no conflict include *Armstrong v. McAlpin, supra*, and *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977).

In *Hoffman v. Hogan*, 137 S.W.2d 441 (Mo. 1940), the lawyer Peal represented Hogan in the tax suit and later represented Hoffman against the Hogans. The court states at 446:

> "The test of inconsistency is not whether the attorney has ever appeared for the party against whom he subsequently proposes to appear, but it is whether his accepting the new retainer will require him to do anything which will injuriously affect his former client

> *in any matter in which he formerly represented him, and* whether he will be called upon *to use against former client any knowledge or information acquired through their former connection.*" (Emphasis supplied).

The definition in *Hoffman* is based on the particular matter in which the lawyer represented the client.

Church of Scientology of California v. McLean, 615 F.2d 691 (5th Cir. 1980), is similar. Berman was an associate with the firm representing the McLeans in defense of a slander suit and before coming to that firm had consulted the church about a zoning matter. The Court pointed out that there was no evidence that the church discussed any issue in the slander suit with Berman or that he had confidential information about it, the same situation that exists in our case (A95, 172, 192). The Court states (l.c. 692):

> "* * * A lawyer need not disqualify himself in a matter concerning a former client unless the terminated employment had some substantial relationship to the pending suit or unless he has received some privileged information * * *."

The Court ruled that Berman's earlier involvement was not related to the slander suit, and affirmed denial of disqualification.

Thus, the terminated relationship of Risjord and Home creates a situation in which Home would have no right to object to Risjord's representing the plaintiffs in this case. No information had been obtained from Home concerning the rim cases and since there was no relationship between Risjord's representation of Home and plaintiffs, there can be no presumption of the transmittal of such information. *E.g.*, Canon 4, Code of Professional Responsibility; *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 383-4 (8th Cir.

1979); *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2nd Cir. 1978); *Trone v. Smith*, ... F.2d ....., No. 77-1832 (9th Cir. June 23, 1980). Home having no right to object, Firestone can have no right to object.

F. The discretion of District Judge Collinson was very broad and his order should be reversed only for clear abuse of his discretion.

The broad discretion placed in the District Judge, and the scope of review of his order is demonstrated by the following statement in *Fred Weber, Inc. v. Shell Oil Company*, 566 F.2d 602, 605 (1977):

> "We apply the scope of review in disqualification cases described in Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975): 'The district court bears the responsibility for the supervision of the members of its bar. [Citing authorities.] The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. [Citing authorities.]' 513 F.2d at 571."

The court has wide discretion in framing its sanctions in motions to disqualify so as to be fair and just to the clients and their attorneys. *International Business Machines v. Levin*, 579 F.2d 271, 279 (3rd Cir. 1978). Courts of Appeals have emphasized the great reliance placed on the District Judge's exercise of discretion. *E.g., Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977).

The reason for the rule is the superior position of the trial judge to evaluate the factual situation before him. As was observed in *Waters v. Western Company of North America*, 436 F.2d 1072, 1073 (10th Cir. 1971):

> "However the discretion of the trial judge in such matters is very broad for appearances may be misleading and the overall proper administration of justice may well allow the trial judge to ignore appearance in favor of fact. What might appear as a conflict of interest on the surface can, in fact, be no conflict at all or so insignificant as to be overcome by other circumstances."

A similar rule has been pronounced in most of the circuits. In addition to the above cases, *see, e.g., Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2nd Cir. 1975); *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corporation*, 518 F.2d 751 (2nd Cir. 1975); *Gas-A-Tron of Arizona v. Union Oil Company of California, et al.*, 534 F.2d 1322, 1325 (9th Cir. 1976).

Application of this rule is particularly important in this case. Firestone has concentrated upon and repeated only a few of the facts (as it mentioned the Martindale-Hubbell listing six times to the District Court [A151]) and omits a substantial part of the record that was before the District Judge (See III A). The District Judge had *all* the facts before him, and there should be no finding of an abuse of discretion.

G. The true reason for Firestone's motion is to eliminate a vigorous advocate.

The decisions on disqualification motions in the Courts of Appeals have recognized the abuse of such motions (*Melamed, supra* at 295), and their use as a common tool for purely strategic or tactical purposes (*Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977) and *Armstrong, supra,* at 9). Certainly, the arguments stressed vigorously by Firestone are those of an "artful movant" that have caused

expenditure of judicial and opponent resources (*Armstrong, supra,* at 29 n. 13).

Firestone has pleaded not only its own case, but most cynically that of the plaintiffs asserting claims against it. Firestone makes no claim that the vigor of Risjord's representation is an issue. There is no such reservation expressed by the District Court (A154, 160). There is no reconsideration of the Court's order approving Risjord as lead and liaison counsel for plaintiffs (A81). The certificate of the clerk showing the docket entries in MDL 362 and numerous deposition and discovery activities show the extent of Risjord's efforts in these cases. Publicity surrounding a case in which Risjord had successfully represented a plaintiff in a tire rim case against Goodyear was an issue raised unsuccessfully in the district court (R69-70). The efforts of Risjord to probe deeply into the "political slush fund" issue (Supplemental Record, Ex. D) involving various individuals and documents involved in the Watergate investigation shows the vigor and success of Risjord's representation of the plaintiffs. Risjord's experience and expertise in this case have been of substantial benefit to plaintiffs and the others involved in the Multi-Piece Rim litigation over a two and one-half year period of time. While Firestone expresses concern in its brief with Risjord's representation of these plaintiffs, it does not attack the vigor of this representation, and it is probable that its concern with Risjord's representation of plaintiffs is because it has been performed with such vigor and success.

Firestone argues that Risjord has asserted a "highly unusual theory" of intentional tort (Br. 4, 34, 37) and argues that Risjord's action, coupled with Home's reservation of rights letters on such theory established the conflict. Firestone ignores the fact that the complaints against not only

Firestone, but Goodyear, Kelsey Hays and Budd, plead claims based on defective products under *Restatement of Torts,* § 402A and negligence (A13, 29, 51, 63, 15-16, 30-32, 52-53, 63-65). Home would cover such theories. Pleading alternative theories in products liability cases is the usual and proper practice in such cases, and a plaintiff is ordinarily allowed to introduce evidence as to the several pleaded grounds and have the case submitted to the jury on all grounds of which there is submissible evidence. *Products Liability, Frumer & Friedman,* Vol. IIIA, § 4601, pp. 16-56, 16-58.1. A number of these theories, including the intentional theory would be a basis for punitive damages. See Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH.L.REV. 1258, and specifically the enumeration of punitive damages awards in Notes 333, 334, pp. 1326-1329.

Certainly, plaintiffs can be properly represented only by counsel who will assert all theories that would justify recovery of either actual or punitive damages to the greatest extent possible. Risjord will undoubtedly try the cases in this manner. Alternative submissions of the varying theories could well produce verdicts that would be covered by the Home policy, as well as verdicts or portions of verdicts that would not be so covered. Firestone's argument that Home and Risjord are working together, or working "in tandem" simply cannot stand, because it is against Home's interest. Similarly, it is in Risjord's interest to prosecute the cases to the utmost. The contractual relations between Home and Firestone may in part determine the obligation to pay judgments but involve Risjord in no conflict of interest with Firestone.

In two earlier cases in the Eighth Circuit, *Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163 (1978), and *Central Milk Producers Cooperative v.*

Sentry Food Stores, Inc., 573 F.2d 988 (1978), the Eighth Circuit pointed to the strong interest in the client being represented by counsel of his choice and the impact that separation of the attorney from the case will have with respect to ultimate disposition of the case.

While factors other than the interests of the client are considered in such cases, the District Court properly balanced these factors in making its order. Firestone filed its motion to disqualify Risjord after he had been designated as lead and liaison counsel at the April 10, 1979 pretrial conference. The Risjord cases against Firestone were filed June 5, 1978, August 29, 1978 and October 31, 1978 (A12, 28, 50, 62) and the motion to disqualify Risjord was filed May 24, 1979 (A104). Firestone's counsel, William Sanders, represented Risjord four years ago and knew of his representation of Home at that time (A92-94). Thus, Firestone is either barred by laches or is estopped to raise its objections to Risjord's continued representation of plaintiffs. *E.g., Central Milk Producers Cooperative v. Sentry Food Stores, Inc., supra; Redd v. Shell Oil Company*, 518 F.2d 311 (10th Cir. 1975). At the very least, this delay should be taken into consideration in weighing the validity of Firestone's motion.

Firestone's conduct in delaying its objection to Risjord's representation is further demonstration that Firestone's motives are not in the public interest, but rather that the disqualification motion is a convenient tool to eliminate an effective advocate for its opponents.

H. There is no appearance of impropriety, and this ground standing alone does not justify disqualification.

Cases considering disqualification motions have held that there will be no presumption of lack of integrity. *Fred Weber, Inc. v. Shell Oil Company,* 566 F.2d 602, 609 (8th Cir. 1977). It was stated in *Church of Scientology of California v. McLean,* 615 F.2d 691, 693 (8th Cir. 1980):

> "* * * An attorney's conduct need not be governed by standards that can be imputed only to the most cynical members of the public. A lawyer need not 'yield to every imagined charge of conflict of interest, regardless of the merits, so long as there is a member of the public who [says that he] believes it' * * *." *Woods v. Covington County Bank, supra,* 537 F.2d at 813.

Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976), pointed to the tactical use of disqualification motions and that a cynical approach would often unfairly deny a litigant to counsel of its choosing.

The appearance of impropriety condemned in Canon 9 was considered in *Board of Education v. Nyquist,* 590 F.2d 1241 (2nd Cir. 1979), and the court observed (l.c. 1247):

> "* * * We believe that where there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases. * * *"

Firestone does not make a supported claim that the trial will be tainted by Risjord's representation of the plaintiffs. The *Nyquist* case set forth a two-pronged definition of taint. It included (1) the use of privileged information obtained through prior representation, which is not applicable in this case (A95, 172, 192), and (2) that a conflict under-

mines the Court's confidence in the vigor of the attorney's representation of the client. As demonstrated under III G, Risjord's representation of plaintiffs has been most effective and vigorous.

Firestone, based on claims of appearances and in arguments grounded in speculation and innuendo, rejected by the trial court (A153), attempts to assert the public interest just as it has asserted the plaintiffs' interest. As was observed in *Woods v. Covington Bank*, 537 F.2d 804, 813 (5th Cir. 1976):

> "* * * the more frequently a litigant is delayed or otherwise disadvantaged by unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the Bar and the judiciary * * *."

The interest of the public in the integrity of the judicial process is that Risjord, the vigorous advocate, continue to represent the plaintiffs in asserting their claims against Firestone.

Firestone's concerns of appearance of impropriety and the public interest are inconsistent with the actions of its own counsel. Professor Rotunda and associate Carothers make affidavits relating to disqualification motions (A107, 111, 197). The professor providing citations of authority for Firestone's brief and Carothers are witnesses, as well as counsel to Firestone, in violation of DR5-102. Similarly, attorney Sanders, who is counsel in this action against Risjord, has represented Risjord (A92-94) and lists Home as a client in Martindale-Hubbell Law Directory (Vol. IV, pp. 99B, 1979), although he is counsel of record for Firestone against Home in a separate proceeding (A217). These conflicting representations raise questions as to the consistency and credibility of Firestone's claims.

I. Firestone's desire to disqualify Risjord in the Hale case is beyond the relief sought in the District Court.

Firestone suggests in a footnote only, but without argument, that not only should Risjord be disqualified as to the three cases in which Home provides coverage, Butler, Goodwin and Rodriquez, but also that Risjord should be disqualified in the Hale case as to which Home does not afford coverage (Br. p. 2, note 3).

This relief is beyond the scope of that requested in Firestone's motion, which asked his disqualification in Multi-Piece Rim cases against Firestone in which Home insures Firestone, or in which information obtained from Home could be useful to plaintiffs. The only evidence in the record is that Risjord provided no information to Home and Home none to Risjord with respect to the Multi-Piece Rim cases (A95, 171, 192).

The Firestone/Home litigation (Complaint A217-221) makes no allegation that Home has furnished information to Risjord, and Firestone suggests this only by innuendo. The issues between Home and Firestone with respect to claimed conflict can be resolved in that litigation, but suffice it to say that if Firestone had discovered that information had been provided by Home to Risjord on the Multi-Piece Rim cases, this information would have been presented to this Court.

Firestone is thus limited in its prayer for relief to those cases in which Home provided insurance which by its admission excludes Hale.

The only basis for the claim in the uninsured Hale case is the appearance of impropriety. The arguments from III H and particularly the language from the *Board of Education v. Nyquist,* 590 F.2d 1241, 1247 (2nd Cir.

1979), cited above, is appropriate. The addition of the Hale case as one in which relief is sought is actually no more than a studied pattern of an overbroad scope of the relief sought and further demonstration that Firestone's motion is essentially for tactical gain rather than because of concern with the legal ethics involved or the representation that is being provided plaintiffs. See *Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977).

CONCLUSION

Orders denying disqualification of an attorney should not be appealable under 28 USC § 1291 because they do not meet the *Cohen* criteria. They turn on the facts of a particular case and do not involve principles of law or public interest. Normal appellate procedures are adequate to vindicate these interests and there is no irreparable injury involved. There is frequent abuse of such motions often used as a tactical weapon and as disguised harassment. There is no justification for upsetting the balance between the appellate and trial processes by granting appeals of right.

Even if the Court determines that disqualification denials are appealable, Firestone has already had its case reviewed by the Court of Appeals for the Eighth Circuit. Because two Courts have reviewed the discretionary and factual findings of this case, this Court should not re-examine these issues.

Firestone's argument ignores most of the record that supported the District Court's ruling that consents as authorized in DR5-105(C) dispel any question of the ability of Risjord to exercise his independent professional judgment on behalf of his client. Firestone is not a client of Risjord and has no standing to raise the consent issues. Since

the disposal of the *Cannova* fire case, Risjord does not represent Home, and the past representation does not give any grounds for disqualification. No true conflict exists, and Firestone's effort to achieve tactical gain should be rejected by affirmance of the District Court's order.

Respectfully submitted,

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ADDENDUM

G = appeal from an order granting a motion to disqualify counsel.

D = appeal from an order denying a motion to disqualify counsel.

First Circuit

1. G *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978)

Second Circuit

1. D *Bohack Corporation v. Gulf & Western*, 607 F.2d 258 (2nd Cir. 1979)
2. D *Armstrong v. McAlpin*, 606 F.2d 28 (2nd Cir. 1979)
3. G *U.S. v. Ostrer*, 597 F.2d 337 (2nd Cir. 1979)
4. G *Board of Education v. Nyquist*, 590 F.2d 1241 (2nd Cir. 1979)
5. G *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2nd Cir. 1978)
6. D *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2nd Cir. 1977)
7. G *In re Taylor*, 567 F.2d 1183 (2nd Cir. 1977)
8. D *Allegaert v. Perot*, 565 F.2d 246 (2nd Cir. 1977)
9. G *NCK Organization, Ltd. v. Bregman*, 542 F.2d 128 (2nd Cir. 1976)
10. D *SEC v. Sloan*, 535 F.2d 679 (2nd Cir. 1976)
11. D *W. T. Grant Company v. Haines*, 531 F.2d 128 (2nd Cir. 1976)
12. G *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2nd Cir. 1976)

13. G *International Electronics Corporation v. Flanzer*, 527 F.2d 1288 (2nd Cir. 1975)

14. D *Lefrak v. Arabian American Oil Company*, 527 F.2d 1136 (2nd Cir. 1975)

15. G *U.S. v. Armedo-Sarmiento*, 524 F.2d 591 (2nd Cir. 1975)

16. D *J. P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357 (2nd Cir. 1975)

17. D *Silver Chrysler-Plymouth v. Chrysler Motors Corporation*, 518 F.2d 751 (2nd Cir. 1975)

18. G *Hull v. Celanese Corporation*, 513 F.2d 568 (2nd Cir. 1975)

19. D *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2nd Cir. 1975)

20. D. *General Motors Corporation v. City of New York*, 501 F.2d 639 (2nd Cir. 1974)

21. D *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corporation*, 496 F.2d 800 (2nd Cir. 1974)

22. G *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2nd Cir. 1973)

23. D *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2nd Cir. 1970)

24. G *Tucker v. Shaw*, 378 F.2d 304 (2nd Cir. 1967)

25. D *Katz v. Kilsheiner*, 327 F.2d 633 (2nd Cir. 1964)

26. D *U.S. v. McFaddin Express, Inc.*, 310 F.2d 799 (2nd Cir. 1962)

27. G *W. E. Basset Company v. H. C. Cook Company*, 302 F.2d 268 (2nd Cir. 1962)

28. D *Marco v. Dulles*, 268 F.2d 192 (2nd Cir. 1959)

29. D *Fleischer v. Phillips*, 264 F.2d 515 (2nd Cir. 1959)

30. D *Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 262 F.2d 856 (2nd Cir. 1959)

31. D *Harmar Drive-In Theatre v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2nd Cir. 1956)

32. G *Fisher Studio v. Loew's Inc.*, 232 F.2d 199 (2nd Cir. 1956)

33. G *Laskey Bros. of W. Va. v. Warner Bros. Pictures*, 224 F.2d 824 (2nd Cir. 1955)

34. G *Consolidated Theatres, Inc. v. Warner Bros., Circuit Management Corporation*, 216 F.2d 920 (2nd Cir. 1954)

Third Circuit

1. D *In Re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3rd Cir. 1978)

2. G *International Business Machines Corporation v. Levin*, 579 F.2d 271 (3rd Cir. 1978)

3. G *U.S. v. Dolan*, 570 F.2d 1177 (3rd Cir. 1978)

4. D *Silberline Manufacturing Co. v. International Nickel Co.*, 569 F.2d 1217 (3rd Cir. 1977)

5. D *Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3rd Cir. 1977)

6. D *Kreda v. Rush*, 550 F.2d 888 (3rd Cir. 1977)

7. D *Kramer v. Scentific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976)

8. D *Kroungold v. Triester*, 521 F.2d 763 (3rd Cir. 1975)

9. G *In the Matter of the Grand Jury Empaneled January 21, 1975; Appeal of Curran*, 536 F.2d 1009 (3rd Cir. 1976)

10. D *American Roller Company v. Budinger,* 513 F.2d 982 (3rd Cir. 1975)

11. D *Greene v. Singer Co.,* 509 F.2d 750 (3rd Cir. 1971)

Fourth Circuit

1. G *Aetna Casualty and Surety Company v. U.S.,* 570 F.2d 1197 (4th Cir. 1978)

2. G *U.S. v. Clarkson,* 567 F.2d 270 (4th Cir. 1977)

3. G *U.S. v. Duklewski,* 567 F.2d 255 (4th Cir. 1977)

4. G *U.S. v. Barker,* 563 F.2d 652 (4th Cir. 1977)

5. D *MacKethan v. Peat, Marwick & Mitchell,* 557 F.2d 395 (4th Cir. 1977)

6. G *U.S. v. Hankish,* 462 F.2d 316 (4th Cir. 1972)

Fifth Circuit

1. D *Church of Scientology of California v. McLean,* 615 F.2d 691 (5th Cir. 1980)

2. D *North American Acceptance Corp. Securities Cases v. Arnall, Golden & Gregory,* 597 F.2d 591 (5th Cir. 1979)

3. G *U.S. v. Kitchin,* 592 F.2d 900 (5th Cir. 1979)

4. G *Brennan's Inc. v. Brennan's Restaurants, Inc.,* 590 F.2d 168 (5th Cir. 1979)

5. D *Zylstra v. Safeway Stores, Inc.,* 578 F.2d 102 (5th Cir. 1978)

6. D *Brown & Williamson Tobacco Corporation v. Daniel International Corporation,* 563 F.2d 671 (5th Cir. 1977)

7. D *Wilson P. Abraham Construction Corporation v. Armco Steel Corporation,* 559 F.2d 250 (5th Cir. 1977)

8. G *Woods v. Covington County Bank,* 537 F.2d 804 (5th Cir. 1976)

9. G *U.S. v. Gopman,* 531 F.2d 262 (5th Cir. 1976)

10. D *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83 (5th Cir. 1976)

11. D *Glenn v. Arkansas Best Corporation,* 525 F.2d 1216 (5th Cir. 1975)

12. G *U.S. v. Garcia,* 517 F.2d 272 (5th Cir. 1975)

13. G *Draganescu v. First National Bank of Hollywood,* 502 F.2d 550 (5th Cir. 1974)

14. G *American Can Company v. Citrus Feed Co.,* 436 F.2d 1125 (5th Cir. 1971)

15. D *Uniweld Products, Inc. v. Union Carbide Corporation,* 385 F.2d 992 (5th Cir. 1967)

16. D *Lucom v. Atlantic National Bank of West Palm Beach, Fla.,* 354 F.2d 51 (5th Cir. 1965)

17. D *U.S. v. Trafficante,* 328 F.2d 117 (5th Cir. 1964)

18. D *Tomlinson v. Florida Iron and Metal, Inc.,* 291 F.2d 333 (5th Cir. 1961)

Sixth Circuit

1. G *General Electric Company v. Valeron Corporation,* 608 F.2d 265 (6th Cir. 1979)

2. D *Melamed v. ITT Continental Baking Co.,* 592 F.2d 290 (6th Cir. 1979)

3. D *In re April, 1977 Grand Jury Subpoenas; General Motors Corp. v. U.S.,* 584 F.2d 1366 (6th Cir. 1978)

4. D *Mathews v. O'Toole,* 582 F.2d 1279 (6th Cir. 1978)
5. D *Melamed v. ITT Continental Baking Co.,* 534 F.2d 82 (6th Cir. 1976)

Seventh Circuit

1. D *Weigel v. Shapiro,* 608 F.2d 268 (7th Cir. 1979)
2. G *Rice v. Rice Foundation,* 610 F.2d 471 (7th Cir. 1979)
3. D *Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc.,* 607 F.2d 186 (7th Cir. 1979)
4. D *Westinghouse Electric Corp. v. Gulf Oil Corp.,* 588 F.2d 221 (7th Cir. 1978)
5. D *In re Special February 1977 Grand Jury,* 581 F.2d 1262 (7th Cir. 1978)
6. D *Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978)
7. G *First Wisconsin Mortgage Trust v. First Wisconsin Corp.,* 571 F.2d 390 (7th Cir. 1978)
8. D *Whiting Corp. v. White Machinery Corp.,* 567 F.2d 713 (7th Cir. 1977)
9. G *Schloetter v. Railoc of Indiana, Inc.,* 546 F.2d 706 (7th Cir. 1976)
10. D *Woodmar Realty Company v. McLean,* 294 F.2d 785 (7th Cir. 1961)

Eighth Circuit

1. D *Multi-Piece Rim; Firestone v. Risjord,* 612 F.2d 377 (8th Cir. 1980)
2. G *Arkansas v. Dean Foods Products Co.,* 605 F.2d 380 (8th Cir. 1979)

3. G *Coffelt v. Shell,* 577 F.2d 30 (8th Cir. 1978)
4. D *Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163 (8th Cir. 1978)
5. D *Fred Weber, Inc. v. Shell Oil Company,* 566 F.2d 602 (8th Cir. 1977)
6. D *Central Milk Producers Cooperative v. Sentry Food Stores,* 573 F.2d 988 (8th Cir. 1978)
7. G *Allied Realty of St. Paul, Inc. v. Exchange Nat'l. Bank of Chicago,* 408 F.2d 1099 (8th Cir. 1969)

Ninth Circuit

1. D *Trone v. Smith,* ..... F.2d ....., No. 77-1832 (9th Cir., filed June 23, 1980)
2. D *Trone v. Smith,* 553 F.2d 1207 (9th Cir. 1977)
3. G *Gas-A-Tron of Arizona v. Union Oil Co. of Calif.,* 534 F.2d 1322 (9th Cir. 1976)
4. D *Chugach Electric Association v. U.S. District Court for District of Alaska at Anchorage,* 370 F.2d 441 (9th Cir. 1966)
5. D *Cord v. Smith,* 370 F.2d 418 (9th Cir. 1966)
6. D *Pioche Mines Consolidated, Inc. v. Dolman,* 333 F.2d 257 (9th Cir. 1964)

Tenth Circuit

1. D *Fullmer v. Harper,* 517 F.2d 20 (10th Cir. 1975)
2. D *Pet Milk Co. v. Ritter,* 323 F.2d 586 (10th Cir. 1963)

D.C. Circuit

1. D *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (D.C. Cir. 1976)
2. G *Securities and Exchange Commission v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976)
3. G *In Re: Investigation Before the April 1975 Grand Jury; Appeal of Rosen*, 531 F.2d 600 (D.C. Cir. 1976)
4. D *Yablonski v. United Mine Workers of America*, 454 F.2d 1036 (D.C. Cir. 1971)
5. D *Yablonski v. United Mine Workers of America*, 448 F.2d 1175 (D.C. Cir. 1971)

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No. 79-1420

In the Supreme Court of the United States

October Term, 1979

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT RISJORD

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SUPPLEMENTAL BRIEF OF RESPONDENT RISJORD

There are several decisions of the Courts of Appeals since Respondent's brief was filed that should be called to the Court's attention.

Abraham Construction Corporation v. Armco Steel Corporation, mentioned on page 14 of Respondent's brief, was remanded by the Court, en Banc, to the panel, and the Order of the en Banc hearing was vacated. 625 F.2d 718 (5th Cir., Aug. 21, 1980). It is Respondent's understanding that the case has been disposed of by settlement.

Armstrong v. McAlpin referred to in Respondent's brief is reported at 625 F.2d 433 (2d Cir. 1980). The following are page references to Respondent's brief with

the corresponding citations of *Armstrong* from the published report.

Page 8, 625 F.2d at 438	Page 17, 625 F.2d at 438, 439
Page 12, 625 F.2d at 437	Page 20, 625 F.2d at 440, 441
Page 13, 625 F.2d at 438	Page 21, 625 F.2d at 437
Page 15, 625 F.2d at 438	Page 42, 625 F.2d at 437

P Stone, Inc. v. Koppers Corporation, et al., Docket No. 80-1111, 1980-81, CCH Trade Cases, ¶ 63,572, was decided by the Third Circuit October 7, 1980. Relying on *Cohen* and *Greene v. Singer Company*, 509 F.2d 750 (3d Cir. 1971), the Court held that on its facts the case was not appealable and that there was no actual or potential harm that could not be vindicated on appeal from a final judgment. The Court observed that the increasing frequency of motions to disqualify "* * * raises the possibility counsel are using them for purely strategic purposes * * *" (1980-81, CCH Trade Cases, 77-041).

Respectfully submitted,

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Petitioner,

vs.

JOHN C. RISJORD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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TABLE OF CONTENTS

Page

Statement of the Case 2

Argument 4

I.

An Order Denying a Motion To Disqualify Counsel Qualifies for Appeal Under the Collateral Order Doctrine 4

A. An Order Denying a Motion to Disqualify Counsel Satisfies the Cohen Criteria for Finality 4

Coopers & Lybrand v. Livesay, Cited by Risjord, Does Not Support His Position Here 4

Risjord's Proposed Test of "Importance" Is Unduly Restrictive 5

B. Appealability of Orders Denying Disqualification Is Consistent With Sound Judicial Policy 6

II.

The Conflict Disclosed by the Present Record Requires That Attorney Risjord Be Disqualified 8

A. The "Consent" Approach Adopted Below Was Inherently Unsound 8

The Trial Court's Action Cannot Be Sustained as a Proper Exercise of Discretion 8

The Rule Cited by Risjord Involving Trial and Appellate Concurral in Resolving Disputed Facts Is Inapplicable Here 9

Extraneous Factors Cited by Risjord Cannot Aid His Position Here 9

Page

The Deficiencies in the Consents Risjord Filed Point Up the Impracticability of the Trial Court's Solution 10

The Cases Cited by Risjord Do Not Support His Position Here 11

B. Neither Home's Purported Discharge of Risjord in Cannova nor the Subsequent Dismissal of that Case Obviate the Need to Disqualify Risjord 11

C. Risjord's Belated Challenge to Firestone's Standing Is Not Well Taken 13

D. Risjord's "In Terrorem" Argument Is Unsound 15

E. Risjord's Suggestions of Harassment and Delay Are Unfounded 15

F. Hale Is Within the Ambit of the Motion to Disqualify 16

G. A True Concern for Plaintiffs' Rights Dictates That Risjord Be Disqualified 17

Conclusion 19

TABLE OF AUTHORITIES

Cases — Page

Acorn Printing Co. v. Brown, 385 S.W.2d 812 (Mo. App. 1964) 11, 15

Aetna Casualty and Surety Co. v. United States, 570 F.2d 1197 (4th Cir. 1978) 5

Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (2nd Cir. 1970) 7

Board of Equalization v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) 10

Brown & Williamson Tobacco Corp. v. Daniel International Corp., 563 F.2d 671 (5th Cir. 1977) 14

Chavez v. Chenoweth, 89 N. Mex. 423, 553 P.2d 703 (1976) 14

Cheng v. GAF Corp., ... F.2d .... (2d Cir. No. 80-7254) 7

Chugach Electric Association v. U.S. District Court for District of Alaska at Anchorage, 370 F.2d 441 (9th Cir. 1966) 6

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) 11

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 4, 5

Covill v. Phillips, 452 F.Supp. 224 (D. Kans. 1978) 18

Craig v. Iowa Kemper Mutual Ins. Co., 565 S.W.2d 716 (Mo.App. 1978) 14

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) 16

Estates Theatres, Inc. v. Columbia Pictures Industries, Inc., 345 F.Supp. 93 (S.D. N.Y. 1978) 14

Fine Paper Antitrust Litigation, In re, 617 F.2d 22 (3rd Cir. 1980) 7

Page

First Wisconsin Mortgage Trust v. First Wisconsin Corp., 571 F.2d 390 (7th Cir. 1978) 8
General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) 14
Glenn v. Arkansas Best Corporation, 525 F.2d 1216 (5th Cir. 1975) 7
Gopman, In re, 531 F.2d 262 (5th Cir. 1976) 14
I.B.M. Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978) 11
Lefrak v. Arabian American Oil Company, 527 F.2d 1136 (2nd Cir. 1975) 7
Messing v. FDI, Inc., 439 F.Supp. 776 (D.N.J. 1977) 11, 14
Moritz v. Medical Protective Co., 428 F.Supp. 865 (W.D. Wisc. 1977) 12, 13
North American Acceptance Corp. Securities Cases v. Arnall, Golden & Gregory, 597 F.2d 591 (5th Cir. 1979) 7
Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, 525 F.2d 1216 (5th Cir. 1975) 7
Payne v. St. Louis Grain Corp., 562 S.W.2d 102 (Mo.App. 1977) 15
Rice v. Rice Foundation, 610 F.2d 471 (7th Cir. 1979) 8
Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) 8
Silberline Manufacturing Co. v. International Nickel Co., 569 F.2d 1217 (3rd Cir. 1977) 7
Silberman v. Bogle, 486 F.Supp. 70 (E.D. Pa. 1980) 6

Page

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) 2
Special February 1977 Grand Jury, In re, 581 F.2d 1262 (7th Cir. 1978) 7
Trone v. Smith, 553 F.2d 1207 (9th Cir. 1977) 7
United States v. MacDonald, 435 U.S. 850 (1978) ... 4
United States v. McFaddin Express, Inc., 310 F.2d 799 (2nd Cir. 1962) 7
United States v. Turkish, 470 F.Supp. 903 (S.D. N.Y. 1978) 14
Waters v. Western Co. of North America, 436 F.2d 1072 (10th Cir. 1971) 8
Weigel v. Shapiro, 608 F.2d 268 (7th Cir. 1979) .. 6, 8
Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978) 7
Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) 7
Whiting Corporation v. White Machinery Corp., 567 F.2d 713 (7th Cir. 1977) 7, 12
Woodmar Realty Company v. McLean, 294 F.2d 785 (7th Cir. 1961) 7
Wong v. Fong, 593 P.2d 386 (Sup.Ct. Hawaii, 1979) 13
Yarn Processing Patent Validity Litigation, In re, 530 F.2d 83 (5th Cir. 1976) 10, 15
Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978) 7

Statute

United States Code, Title 28, Sec. 1292(b) 7

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JOHN C. RISJORD,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

Statement of the Case.

Risjord[1] asserts that Firestone omitted facts from its Brief, but the instances cited consist of matters that actually were included in Firestone's Brief[2] or are not of real significance in terms of the issues before this Court.[3]

---

[1]We employ the same abbreviations as in our Opening Brief.

[2]For example, Firestone's Brief did not refer to Risjord's Complaint as being grounded *solely* on a theory of intentional tort (see Pet. Op. Br., p. 4, noting Risjord includes an intentional tort theory), although Risjord's inclusion of other theories actually does not aid his position here. Indeed, it is in precisely such a context of multiple-theory pleading coupled with an effort to avoid insurance coverage that the risk of insurer-motivated conduct by trial counsel has been recognized. (See Pet. Op. Br., pp. 37-38)

Firestone's Brief did take note of the vaguely worded "consents and approvals" of referring counsel of the Risjord Plaintiffs (see Pet. Op. Br., p. 42).

Firestone did not rely in its Brief on the Merits on *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) but expressly noted that *Silver Chrysler* had been overruled.

[3]The fact that Firestone was to provide its own defense under Home's excess insurance policy is irrelevant here, except perhaps insofar as it may weaken Home's farfetched challenge to Firestone's standing. (See page 14 note 21, *infra*.) Nor is the basic conflict with which we are concerned here dependent on the extent to which information concerning Firestone did or did not pass between Risjord and Home, or upon the presence or absence of a subject matter nexus between the present litigation and that in which the Risjord firm has represented Home. See page 9, *infra*.

It does not matter how Risjord may proceed in a suit (*Campbell v. Goodyear*) filed (June 29, 1979) after Firestone had questioned the possible motives for Risjord's intentional tort theory in his suit against Firestone. For Risjord to have proceeded otherwise against Goodyear would have been tantamount to an admission by Risjord that Firestone's concerns were well taken.

The mere fact that Home reserved rights in some cases not involving rims or wheels in which Risjord was not counsel does not affect the proceedings here. It is the *combination* of Risjord's role and Home's disavowal that poses the problem.

Nor does it matter whether Home was the sole party represented by Risjord in *Cannova*, since the true depth of the twenty-year relationship between Home and the Risjord firm cannot be measured in terms of Risjord's precise role in a single case.

While Risjord contends that Firestone does not present the "true nature" of his relationship with Home, Risjord fails to cite any inaccuracies in Firestone's account. Instead, Risjord attempts to minimize his relationship to Home by adverting to matters of no real moment. For example, Risjord seeks to distinguish between matters handled by himself personally as opposed to those handled by his firm (an invalid distinction; see Pet. Op. Br., p. 3); purports to disassociate himself from Home Indemnity Company, which he suggests (erroneously; see Pet. Op. Br., p. 44) was the Home entity insuring Firestone;[4] and employs such self-serving adjectives as "minimal" to describe the various matters (other than *Cannova*) in which the Risjord firm has "periodically" (A. 90-91) acted as Home's attorneys over the years.

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[4]Elsewhere in Risjord's Brief it is now acknowledged that Risjord's purported distinction is invalid. (Resp. Br., p. 36).

ARGUMENT.

I.

AN ORDER DENYING A MOTION TO DISQUALIFY COUNSEL QUALIFIES FOR APPEAL UNDER THE COLLATERAL ORDER DOCTRINE.

A. An Order Denying a Motion to Disqualify Counsel Satisfies the *Cohen* Criteria for Finality.[5]

Coopers & Lybrand v. Livesay, Cited by Risjord, Does not Support His Position Here.

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), repeatedly cited by Risjord, does not support his position here. In *Coopers & Lybrand,* the Court addresses the appealability of a determination that an action may not be maintained as a class action. While holding that such an order was not appealable under *Cohen* (on the ground, *inter alia,* that class action determinations are enmeshed with the merits), the Court devoted its attention primarily to rejection of the "death knell" doctrine, a distinct doctrine which had been applied by some lower courts in the class action context but which (unlike *Cohen*) had not been sanctioned by this Court. The language cited by Risjord is taken largely from the Court's criticism of the "death knell" doctrine[6] and is inapposite here.[7]

---

[5]While we do not urge that appeals be limited to a particular type of case, if such an approach were adopted we submit that cases such as the present one (involving the duty of undivided loyalty) are particularly suited for appeal, since the issues they pose are likely to be especially clear-cut.

[6]Risjord also cites the discussion in *Coopers & Lybrand* of *Gillespie v. U. S. Steel Corp.*, 379 U.S. 148 (1964), but that discussion likewise was not directed to the *Cohen* doctrine.

[7]The situation here also is not analogous to that in *United States v. MacDonald,* 435 U.S. 850 (1978), cited by Risjord. In *MacDonald,* involving the appealability of an order denying a motion to dismiss a criminal case for alleged violation of defendant's right to a speedy trial, the Court (after noting the special need for limiting appeals in the *criminal* context) cited several factors (not present here) which precluded appeal. These included: (1) the close connection between the issues raised on such a motion and the merits of the case: (2) the fact that any undue delay would have occurred *prior to trial* and hence the trial itself would not enhance any claimed deprivation: (3) the need to assess the impact of any alleged delay after trial and consequent tentative

Risjord's Proposed Test of "Importance" Is Unduly Restrictive.

Risjord urges that *Cohen* requires that the order appealed from be addressed to potentially decisive legal issues and that orders denying disqualification fail to meet this test because they require resolution on a "case-by-case" basis. While the present case meets even Risjord's supposed test (see Pet. Op. Br., pp. 19-20), as noted in our Opening Brief (p. 19), that test is unduly restrictive.[8] Moreover, no such test is applied to preclude review of orders *granting* disqualification.

Insofar as Risjord argues that the existence of "discretion" in ruling on disqualification orders precludes review under *Cohen*:

(1) The "abuse of discretion" standard to which Risjord adverts is by no means universally accepted in this area[9] and would be inapposite in any event under circumstances such as are here presented (see p. 8, *infra*). But, irrespective of the semantics employed in describing the standard of review in a given case, the factors cited in our Opening Brief (*e.g.*, the special importance of such orders not only in terms of their impact upon the losing party but also in terms of the serious questions of public policy they address) dictate that immediate review be afforded so as to monitor

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nature of any pretrial determination of that question; and (4) the fact that an acquittal would fully vindicate the interests to be served. The inapplicability here of factors (1), (2) and (4) is apparent; the inapplicability of factor (3) is discussed at page 18 of our Opening Brief.

[8]Risjord (p. 14) cites *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), as supposedly laying down a four-fold test including resolution of "an important issue which does not merely involve the exercise of discretion." But the passage cited by Risjord from that case does not in fact lay down such a requirement.

[9]See, *e.g.*, *Aetna Casualty and Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978):

"We are inclined to agree with the Fifth Circuit that '[i]n disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms,' and that it is appropriate for us 'to determine whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles.' "

transgressions. Insofar as the real thrust of Risjord's argument is that the trial court ought to be the final arbiter, this circular reasoning assumes the very point at issue. Nor is Risjord's assumption of trial court infallibility a credible one. (see Pet. Op. Br., p. 24.)

(2) The generally accepted propriety of appeals from orders *granting* disqualification undermines this contention, unless it be contended that the trial court's "discretion" may be exercised only in one direction.

B. Appealability of Orders Denying Disqualification Is Consistent With Sound Judicial Policy.

Risjord's assertions of abuse are premised on fallacious assumptions as to the volume and delaying effect of appeals from denials of disqualification. See, *e.g.*, *Silberman v. Bogle*, 486 F.Supp. 70, 72 (E.D. Pa. 1980) (trial Court can and will proceed with discovery despite pending appeal from order denying disqualification). In this regard, we take issue with the Addendum to Risjord's Brief, which purports to list some 105 appeals in disqualification matters by way of a purported demonstration of the quantum of appeals at issue here. While even a total of 105 appeals over the span of years encompassed in Risjord's list would not be as impressive as Risjord's argument suggests, Risjord's list is grossly inflated. For example:

1. Risjord includes appeals from orders *granting* disqualification. Indeed, the only case listed from the First Circuit and five of the six cases listed from the Fourth Circuit are described by Risjord as appeals from orders *granting* disqualification.

2. Risjord's list includes writ proceedings. (See, *e.g.*, *Chugach Electric Association v. U. S. District Court for District of Alaska at Anchorage*, 370 F.2d 441 (9th Cir. 1966).

3. Risjord includes post-judgment appeals (see, *e.g.*, *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2nd Cir. 1970); *U.S. v. McFaddin Express, Inc.*, 310 F.2d 799 (2nd

Cir. 1962)) and one or more appeals under 28 U.S.C. §1292(b) (see, *e.g.*, *Trone v. Smith*, 553 F.2d 1207 (9th Cir. 1977)).

4. Risjord's list includes cases involving situations extraneous to the question with which we are here concerned.[10]

5. Risjord's list contains duplications; *i.e.*, the same matter is cited in successive stages. See, *e.g.*, Second Circuit items 17 and 21.

Finally, Risjord's list does not take account of the fact that a substantial percentage of appeals from orders denying disqualification have resulted in reversals. (See Pet. Op. Br., p. 24). See also *Cheng v. GAF Corp.*, ... F.2d .... (2d Cir. No. 80-7254, August 26, 1980) (order denying disqualification reversed). For example, of the cases cited by Risjord from the Seventh Circuit, 4 orders denying disqualification were affirmed,[11] two such orders were reversed,[12] while the remaining case cited (*Weigel v. Shapiro*,

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[10]See, *e.g.*, *Lefrak v. Arabian American Oil Company*, 527 F.2d 1136 (2nd Cir. 1975) (alleged improper solicitation of clients; *In Re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3rd Cir. 1980) (class counsel); *North American Acceptance Corp. Securities Cases v. Arnall, Golden & Gregory*, 597 F.2d 591 (5th Cir. 1979) (same); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978) (same); *Silberline Manufacturing Co. v. International Nickel Co.*, 569 F.2d 1217 (3rd Cir. 1977) (discovery order); *Glenn v. Arkansas Best Corporation*, 525 F.2d 1216 (5th Cir. 1975) (counsel in derivative action).

[11]*Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979); *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978); *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977); *Woodmar Realty Company v. McLean*, 294 F.2d 785 (7th Cir. 1961)

[12]*Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

608 F.2d 268 (7th Cir. 1979)) did not reach the merits of the disqualification question.[13]

II.

THE CONFLICT DISCLOSED BY THE PRESENT RECORD REQUIRES THAT ATTORNEY RISJORD BE DISQUALIFIED.

A. The "Consent" Approach Adopted Below Was Inherently Unsound.

The Trial Court's Action Cannot Be Sustained as a Proper Exercise of Discretion.

While the propriety of applying an "abuse of discretion" standard in reviewing a motion to disqualify is itself a subject of dispute (see p. 5, *supra*), in the present case the trial court's action could not be sustained as a proper exercise of discretion in any event. The basic facts were essentially undisputed and the trial court itself found a likelihood that the exercise of Risjord's independent professional judgment would be adversely affected by his differing interests. Unfortunately, the trial court failed to address the full implications of that finding or to take meaningful corrective action. That failure cannot plausibly be viewed as an exercise of "discretion".[14]

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[13]It should be noted that the percentage of affirmances cited here (57%) is less than on the cited Seventh Circuit appeals from orders granting disqualification, of which two were affirmed (*Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976) and *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390 (7th Cir. 1978) (the latter case actually involving a question of post-disqualification access to work product)) and the remaining case (*Rice v. Rice Foundation*, 610 F.2d 471 (7th Cir. 1979)) was remanded for further consideration (*i.e.*, a 67% affirmance rate). These figures hardly argue for a rule precluding appeals from orders denying disqualification as contrasted with the generally accepted rule allowing appeals from orders granting disqualification.

[14]In *Waters v. Western Co. of North America*, 436 F.2d 1072 (10th Cir. 1971), repeatedly cited by Risjord, the appellate court actually dismissed for lack of an adequate record and by reason of the request of the appellant's private counsel (as opposed to his insurance carrier-designated counsel) that the appeal be dismissed.

The Rule Cited by Risjord Involving Trial and Appellate Concurral in Resolving Disputed Facts Is Inapplicable Here.

This is not a case in which the trial and appellate courts have concurred in resolving a factual dispute, in which event this Court might understandably be reluctant to upset their determination. As previously noted, the trial court here itself recognized that the basic facts were essentially undisputed (A. 157), found a conflict of interests (A. 160), and then simply failed to take appropriate action. The court of appeals, in turn, hobbled by its approach to the appealability question, failed to address the merits in a meaningful fashion. Under the circumstances, there is no occasion for the deference urged by Risjord.

Extraneous Factors Cited by Risjord Cannot Aid His Position Here.[15]

The conflict with which we are here concerned does not depend upon any threatened breach of confidentiality. Accordingly, Risjord's assertion of a lack of subject matter nexus between the present case and those in which he and his firm have represented Home over the past twenty years (*e.g.*, that they did not involve defense of Firestone or similar liability insureds) is beside the point, as is Risjord's claim that there has been no proof that Home has turned over information to Risjord.

It is likewise unnecessary here to determine whether Risjord's intentional tort theory was in fact conceived for sinister motives.[16] Regardless of its genesis, given Risjord's

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[15]The extraneous matters in Risjord's Brief also include some gratuitous insults of various Firestone counsel and affiants, to which we do not propose to respond.

[16]Implicit in much of Risjord's argument is the notion that disqualification cases necessarily fall into two groups: *i.e.*, those involving actual dishonesty by counsel and those involving mere surface irregularities of no real moment. Actually, account also must be taken of cases (like the present) in which the conflict by its very nature precludes the affected attorney from approaching his task with the requisite detachment and single-minded loyalty. In such cases, the conflict must be viewed as tainting the proceedings *per se*. Viewed in this context, expressed concerns about an "appearance of impropriety" are seen as reflecting not mere surface concerns but a realistic recognition that one cannot and need not probe the actual thought processes of counsel to conclude that disqualification is in order.

awareness of Home's stake in the success of that theory (as opposed to those Risjord acknowledges are indisputably covered by Home's policy), his longstanding relationship with Home (and the expectation of future business inevitably flowing therefrom) and the tactical and strategic choices he inevitably will confront as counsel for the Risjord Plaintiffs, Risjord simply cannot approach his task with the same detachment and undivided loyalty as an attorney freed of his differing interests.

The conflict in which Risjord is thus inextricably intertwined is by no means a mere technical one, as Risjord would suggest. It goes to the essence of the proceeding and, to use a phrase favored by Risjord, will "taint the underlying trial".[17]

The Deficiencies in the Consents Risjord Filed Point Up the Impracticability of the Trial Court's Solution.

Risjord's belated suggestion that Firestone should have raised the inadequacies of the purported consents[18] in the trial court misconceives the thrust of Firestone's position. Since Firestone disputed the viability of the trial court's consent approach *per se*, no useful purpose could have been served in terms of Firestone's appeal by debating the contents of the consents in the trial court.

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[17]Risjord's suggestion that the present case does not fit neatly into one of the two categories of "taint" cited in *Board of Equalization v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), merely attests to the oversimplification inherent in such conceptual "pigeonholes".

[18]In an apparent effort to excuse the failure of Home and the Risjord Plaintiffs to consent to Risjord's dual representation, Risjord asserts that neither could consent to Risjord's representation of the other, but Risjord fails to explain why they would be unable to do so. Indeed, the fallacy in Risjord's assertion is pointed up by *Yarn Processing*, 530 F.2d 83 (5th Cir. 1976) a case cited by Risjord himself, where the court refers to "consent to the employment of the attorney by an adverse party . . ." 530 F.2d 89.

The Cases Cited by Risjord Do Not Support His Position Here.

In *I.B.M. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978), the court *disqualified* counsel, and the court's statement that "at the very least" fully informed consent would have been required must be viewed in that light. Moreover, the case involved parties far more sophisticated than the Risjord Plaintiffs and was devoid of the special concerns and dangers posed by the multi-faceted conflict here — *e.g.*, an additional affected non-consenting interest (Firestone). Nor was the standard of disclosure voiced in *Levin* satisfied here. See Pet. Op. Br., p. 41.

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) again *affirmed a disqualification order*; the court's oblique reference to "consent" not only falls far short of a ringing endorsement (see Pet Op. Br., p. 41) but alludes to "consent of all concerned", which in the present context would include Firestone. The additional comments above regarding *Levin* also apply here.

Messing v. FDI, Inc., 439 F.Supp. 776 (D.N.J. 1977), merely involved the question of joint representation of sophisticated co-defendants whose interests might diverge, while *Acorn Printing Co. v. Brown*, 385 S.W.2d 812 (Mo.App.1964), (discussed at page 15, note 22 *infra*) was not remotely similar on its facts.

B. Neither Home's Purported Discharge of Risjord In *Cannova* Nor the Subsequent Dismissal of that Case Obviate the Need to Disqualify Risjord.

In a belated attempt to salvage Risjord, Home purported to discharge him as its attorney in the *Cannova* case (A. 190), but neither that gesture, nor the subsequent dismissal of *Cannova* to which Risjord now adverts, serves to cure the conflict of interests in which Risjord has become enmeshed or to obviate the need for his disqualification. The relationship between Risjord and Home is long-standing and

deeply rooted. It far transcends Risjord's involvement in *Cannova. It extends over a period of some twenty years, during which the Risjord firm has represented Home in a number of matters and consistently held Home out to the public as their foremost insurance client* (A. 90-91, 98-99, 100-102, 105-106). Given the depth and permanence of the Risjord-Home relationship, Home's gesture in purporting to jettison Risjord in a single lawsuit cannot be viewed realistically as severing the ties that have bound Home and Risjord together for two decades.

Irrespective whether Risjord may be handling a particular case at a given point in time,[19] Risjord must inevitably be aware that his firm's potential future business with this long-standing client might well depend on the extent his actions tended to aid or hinder that client's efforts to defeat coverage on the claims of the Risjord's Plaintiffs. Indeed, the very fact that the Risjord firm admittedly has been handling matters for Home *for twenty years on a case-by-case basis* undermines Risjord's effort to seek comfort from any claimed interlude conveniently coinciding with the present appellate proceedings.

Turning to the cases cited by Risjord, each is readily distinguishable.

In *Whiting Corporation v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977), plaintiff's counsel merely acted as attorneys for a *minority shareholder* of defendant, a situation not remotely similar to the present case.

In *Moritz v. Medical Protective Co.*, 428 F.Supp. 865 (W.D. Wisc. 1977), the attorney's proposed withdrawal was directed not to the *insurer* (Medical Protective Co.) but to the *individual* (Moritz) he had been assigned to represent

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[19]Risjord cites the Affidavit of one Larry Wagner as stating that the *Cannova* case was "the only case handled by Risjord"; actually Mr. Wagner merely refers to *Cannova* as the only case in which the Risjord firm was employed by Home at that particular point in time. (A. 170-171.)

in a single (state court) case, and to whom he occupied no overall relationship akin to that of Risjord to Home. Nor did the case pose a situation akin to that presented by the multi-faceted conflict in the instant case. Even in that context, the district court did not sanction the withdrawal, but left the matter for determination by the state court in which the suit in question was pending, ruling that if the state court declined to sanction that withdrawal, Moritz's motion to disqualify the attorney in the district court suit would be deemed granted.

In *Wong v. Fong*, 593 P.2d 386 (Sup.Ct. Hawaii, 1979) the appellate court initially undertook to review by mandamus the trial court's action permitting the law firm representing A (by designation of A's insurer) in a malpractice case to withdraw in order to represent B in an unrelated action against A. But when it developed that the malpractice suit had been settled and dismissed, the firm was permitted to represent B. The distinguishing factors noted with respect to *Moritz* (*e.g.*, the lack of a long-standing relationship between A and the law firm in question and of ongoing dangers akin to those in the present case) are apposite here as well.

C. Risjord's Belated Challenge to Firestone's Standing Is Not Well Taken.

In the Court of Appeals, Risjord raised an argument not advanced by him in the trial court, *i.e.*, that Firestone lacks standing to seek his disqualification.

Perhaps the simplest answer to this challenge to standing is found in the authorities deriving standing from the duty

of any attorney to bring such matters to the court's attention.[20]

But it is not necessary here to rely on this doctrine, for it is clear that Firestone is not a mere interloper; it has a vital interest in avoiding the dangers posed by permitting an attorney linked to its insurer Home[21] to control the course of lawsuits in which Home is seeking to avoid coverage.

In so doing, it is entirely proper for Firestone to call the Court's attention to the fact that in the present context, the linkage between attorney Risjord and Home not only poses risks to Firestone (as Home's insured), but also creates an appearance of impropriety in terms of Risjord's relationship to the Risjord Plaintiffs, insofar as his loyalty to them may be or appear to be diluted by a concern, conscious or unconscious, for Home's interests in defeating coverage.

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[20]See, *e.g.*, *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976); *Brown & Williamson Tobacco Corp. v. Daniel International Corp.*, 563 F.2d 671, 673 (5th Cir. 1977). *Cf. General Motors Corp. v. City of New York*, 501 F.2d 639, 651-52 (2d Cir. 1974); *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F.Supp. 93, 98 (S.D.N.Y. 1972); *United States v. Turkish*, 470 F.Supp. 903, 909 (S.D.N.Y. 1978). See also *Messing v. F.D.I., Inc.*, 439 F.Supp. 776 (D.N.J. 1977) (cited by Risjord in another context) where the court held that defendant A had standing to challenge a conflict arising from the same counsel representing various other parties, notwithstanding A was not itself a client of the challenged counsel).

[21]The fact that the Home policy is one of excess coverage, in which Firestone ordinarily handles its own defense, reinforces Firestone's right to a voice in the disqualification proceedings.

Moreover, we take issue with Risjord's assertion that Home owed no fiduciary obligations to Firestone, nor do the cases cited by Risjord support that claim. *Craig v. Iowa Kemper Mutual Ins. Co.*, 565 S.W.2d 716 (Mo.App. 1978), merely declined to find such a relationship in the special context of uninsured motorist coverage, while *Chavez v. Chenoweth*, 89 N.Mex. 423, 553 P.2d 703 (1976) states that the existence *vel non* of a fiduciary obligation to the insured must be determined in light of the particular factual context in which the question arises. Such a duty plainly existed in this case insofar as Home was in a position to affect Risjord's retention as counsel for plaintiffs and thereby to control the course of the litigation. And insofar as Home failed to act in a manner consistent with those duties, Firestone cannot reasonably be foreclosed from acting on its own behalf.

In urging the contrary, Risjord suggests that it is Home, rather than Firestone, that ought to be entrusted with the decision whether or not to seek Risjord's disqualification. But in a context in which Home may stand to benefit from the very division of loyalties in question, such a view is utterly unrealistic. Nor can the personal injury plaintiffs Risjord represents be expected to appreciate fully the dangers posed in the relatively sophisticated context of the instant case. Certainly the courts should not be powerless to vindicate the public interest here merely because the conflict is more complex than that usually encountered.[22]

D. Risjord's "*In Terrorem*" Argument Is Unsound.

We wish to dispel Risjord's suggestion that his disqualification *per se* would preclude any attorney who ever represented Home from suing anyone ever insured by Home. The disqualification here sought turns on a special combination of facts: an attorney with a longstanding and deeply rooted relationship to an insurer suing its insured on a theory which the insurer cites as a ground for avoiding coverage.

E. Risjord's Suggestions of Harassment and Delay Are Unfounded.

The simplest answer to Risjord's claim that Firestone's motion to disqualify him is merely designed for harassment

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[22]Nor do the cases cited by Risjord support his position. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976) involved the effect of past representation of a former client, with preservation of client confidences the focal point of inquiry and the former client's failure to object viewed as evidencing a lack of concern on that score. Where, as in the present case, the conflict is of the "open and obvious" type, the *Yarn Processing* court itself recognized that a narrow approach to standing would be inappropriate.

In *Payne v. St. Louis Grain Corp.*, 562 S.W.2d 102 (Mo.App. 1977) the court noted that the complaining party A failed to indicate how it might be adversely affected by the fact the attorney for party B previously had represented party C.

In *Acorn Printing Co. v. Brown*, 385 S.W.2d 812 (Mo.App. 1964), third party defendant A knowingly engaged the same attorney who represented plaintiff B; after a judgment adverse to A, A sought to set aside the judgment on the basis of a claimed conflict.

is that the trial court itself not only found Firestone's concerns to be well taken but took pains to endorse Firestone's present appeal and the substantiality of the question it poses (A. 160). Nor has Firestone sought to delay the progress of discovery pending the resolution of that question, a factor further evidencing Firestone's good faith.[23] Moreover, the uncontradicted facts of record attest to the legitimacy of Firestone's concerns.[24]

F. *Hale* is Within the Ambit of the Motion to Disqualify.

Firestone's motion sought to disqualify Risjord, *inter alia*, in rim cases in which information obtained from Home

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[23]While Risjord asserts that Firestone moved to disqualify Risjord after he was designated lead and liaison counsel at the first pretrial conference (held March 29, 1979), actually Firestone had declared its intention to so move in its Suggested Plan for the First Pretrial Conference, filed March 26, 1979, prior to Risjord's being so designated. (Pet. Proposed Supp. Record) (Firestone has moved to augment the record by adding this item from the trial court record. In view of the pro forma nature of the motion (which it is anticipated will be unopposed) it appears inappropriate to defer filing the Reply Brief pending formal action by the Court.)

[24]Nor is there merit to Risjord's argument, first urged on appeal, that Firestone is guilty of laches. In essence, Risjord contends that Firestone should have known of Risjord's relationship to Home at the time he filed suit on behalf of the Risjord Plaintiffs because William Sanders (Firestone's liaison counsel in this multi-district litigation) had been engaged by Risjord's errors and omissions insurer some years ago to defend Risjord against a libel charge asserted against Risjord in the *Cannova* suit (The libel claim was disposed of by summary judgment). (A. 93). There is no suggestion Mr. Sanders had been aware of the continuing and deep-rooted nature of the Home-Risjord relationship. Nor does Risjord suggest wherein Firestone could be charged with knowledge allegedly acquired by Mr. Sanders in another context. Moreover, the multi-faceted conflict in which Risjord was involved could not have become apparent prior to the time Home disavowed liability to Firestone on the intentional tort claims of the Risjord Plaintiffs. And Risjord's own delay in urging the point and his failure to demonstrate any prejudice militate against it in any event. Nor are laches claims lightly entertained in the present context, given the public interest considerations involved. See, e.g., *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (three-year delay not fatal).

could be useful to plaintiffs. (A. 104). *Hale* clearly falls within that description, since it involves a subject matter (rims) as to which Firestone has imparted data to Home as its insurer (A. 112) and the danger alluded to in the motion exists irrespective whether Firestone can prove that Home actually transmitted information to Risjord.[25]

While Risjord's argument therefore rests on a false premise, there is an even more important reason for rejecting it. Because of the obvious interrelationship of the four Risjord cases (the complaints generally follow the same format), Risjord's strategy and actions in *Hale* must inevitably be colored by his approach in *Butler, Goodwin*, and *Rodriguez* and by his awareness that the course he follows in *Hale* will tend to aid or hinder Home's position in *Butler, Goodwin* and *Rodriguez*.

Indeed, Risjord himself secured purported consents from the *Hale* plaintiffs as well as from those in *Butler, Goodwin and Rodriguez*. (A. 167.) Nor has Risjord heretofore challenged Firestone's position in this respect.

G. A True Concern for Plaintiffs' Rights Dictates That Risjord Be Disqualified.

Risjord's professed concern for plaintiffs' rights appears misplaced. For the danger that Risjord will guide the cases so as to further (or at the very least so as not to hinder) the efforts of his client Home to defeat coverage poses a threat not only to Firestone but also to the Risjord Plaintiffs, who are entitled to representation by counsel whose loyalty is

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[25]Those concerns are by no means fanciful. For example, a memorandum in the files of the Insurance Institute for Highway Safety disclosed that Risjord had provided that organization with documents consisting largely of "communications between various wheel manufacturers and their insurors." (R. 259)

not impaired by such considerations.[26] Stated otherwise, what ought to concern this Court is not the fact that plaintiffs selected Risjord (and, being insufficiently sophisticated or informed to appreciate the dangers, may have acquiesced in his retention), but the fact that Home, whose motives are hardly above suspicion, is demonstrably eager to have him in the case.

These concerns cannot be dispelled merely by the alleged volume of Risjord's activity, as the question remains: To what extent may that activity reflect the double burden of serving two masters, or at least be colored by Home's interests?[27] In short, the basic problem here must be perceived not merely in terms of the degree of Risjord's "vigor" (or lack thereof) but rather in terms of the danger that any such "vigor" may be directed, consciously or unconsciously, to Home's ends.

Nor will Risjord's replacement adversely affect any legitimate interests of the plaintiffs he now represents. Certainly there are ample competent plaintiffs' counsel without linkage to Home available to prosecute plaintiffs' cases[28] free of the ethical concerns posed by Risjord's retention.[29]

In essence, the real dichotomy in these proceedings lies not between Firestone and plaintiffs, but between Risjord

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[26]While Risjord expounds on the alleged benefits of his approach to discovery, that approach has not been viewed with unanimous approval. See, *e.g.*, *Covill v. Phillips*, 452 F.Supp. 224, 239 (D. Kans. 1978), where the court describes Risjord's conduct in the course of discovery as "reprehensible" and as generating "distrust and acrimony".

[27]It can hardly be assumed that "more is better"; for example, Risjord might be tempted to overtry his case to afford Home at least an opportunity to dispute coverage.

[28]Indeed, it seems likely that most plaintiffs' counsel would be free from such ties to an insurer.

[29]While Risjord urges that his pursuit of a variety of theories is necessarily in plaintiffs' interests, the benefits of such a "shotgun" approach over more traditional ones are not self-evident; in any event, the tactical and strategic choices which inevitably will arise in that pursuit (*e.g.*, in terms of relative emphasis or the possible jettison of one line of approach to strengthen another,) are by no means obvious.

and Home on the one hand, and on the other hand Firestone, the plaintiffs, and the need to protect the public confidence in the judicial system. The choice between those interests cannot admit of serious doubt.

Conclusion.

Risjord's response fails to dispel the two central conclusions which the present record impels: (1) the trial court's order denying disqualification was appealable; and (2) the conflict which Risjord inevitably confronts requires that he be disqualified.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1979

In re:
Multi-Piece Rim Products Liability Litigation.

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY TO UNITED STATES GOVERNMENT BRIEF AMICUS CURIAE.

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TABLE OF CONTENTS

Page

Introduction 1

I.

The Government's Challenge to Appealability Is Not Well Taken 3

II.

The Government's Challenge to Firestone's Standing Is Not Well Taken 6

III.

The Government's Position on the Merits Is Not Well Taken 9

Conclusion 11

TABLE OF AUTHORITIES

Cases — Page

Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197 (4th Cir. 1978) 9

Association of Data Processing Service Organizations, Inc. v. Camp., 397 U.S. 150 (1970) 8

Brennans, Inc. v. Brennans Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979) 10

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 2, 3

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) 10

Sapienza v. New York News, Inc., 481 F.Supp. 676 (S.D.N.Y. 1979) 7, 8

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 8

Stack v. Boyle, 342 U.S. 1 (1951) 3

United States v. MacDonald, 435 U.S. 850 (1978) ... 5

United States v. Partin, 601 F.2d 1000 (9th Cir. 1979) 8

Village of Arlington Heights v. Metropolitan Housing Devpt. Corp., 429 U.S. 252 (1977) 9

Warth v. Seldin, 422 U.S. 490 (1975) 8

Textbook

Code of Professional Responsibility, Canon 5, DR 5-105 ..... 7, 9, 10

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PETITIONER'S REPLY TO UNITED STATES GOVERNMENT BRIEF AMICUS CURIAE.

Introduction.

The Department of Justice has filed a Brief for the United States as Amicus Curiae (hereafter "Government Brief"). While generally supportive of the position of Respondent Risjord,[1] the Government Brief not only raises additional

[1]In accordance with prior practice, we shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs".

arguments but also espouses positions at variance with those urged by Risjord. Accordingly, Firestone is replying separately to the Government Brief.

Before addressing the principal arguments advanced by the Government, a few preliminary observations are in order.

First of all, the Government Brief makes certain concessions which tend to support arguments urged by Firestone. Thus the Government acknowledges that in applying the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court has not adopted the narrow touchstone (*i.e.*, of important questions of law) espoused by Risjord. The Government also recognizes the narrow scope of mandamus, which precludes its use as an effective substitute for appeal in disqualification cases.

Secondly, the Government repeatedly seeks to apply what is in practical effect a double standard. In essence, the Government seeks to fashion a rule which would permit the Goverment to obtain immediate appellate relief from orders denying its attempts to disqualify counsel, while conveniently closing that avenue to certain private litigants, presumably including some who might seek to challenge present or former Government counsel. The role which the Government thus adopts, while understandable in terms of its own self-interest, hardly can be characterized as a neutral one, let alone one clothed with the public interest.

Third, the Government goes further and assumes a role which is difficult to understand in terms of an *amicus curiae* (even one guided by its own self-interest). In effect, the Government purports to address the merits of the specific case at hand in a fashion which does not appear relevant to any apparent governmental interest. In effect, the Government, without really coming to grips with the underlying

issues, urges that the trial court's order denying disqualification ought not to be reversed.

Finally, it is interesting to note that as recently as January 26, 1980, the Government, appearing as amicus curiae in another case, expressed the following views, in broad language which appears to contradict its position here:

> "The government agrees with this Court's decision in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (*en banc* decision), that an order denying a disqualification motion is appealable. Such a ruling is collateral to the main action within the meaninig of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Moreover, such an Order could not be effectively reviewed on appeal of the underlying action." Brief of the United States as Amicus Curiae in *Armstrong v. McAlpin*, __ F.2d __ (2d Cir. No. 79-7042, June, 1980), page 9, note 4.

I.

THE GOVERNMENT'S CHALLENGE TO APPEALABILITY IS NOT WELL TAKEN.

The Government does not urge that disqualification orders generally should be non-appealable but contends that the denial of disqualification here in question fails to pass muster in this regard. That contention is grounded on the Government's view that no irreparable injury would be sustained if appellate review were deferred until after judgment on the merits.[2] In order to point up the basic fallacy in that

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[2]The Government also suggests that the disqualification proceeding here may be tied to the merits of the case and hence is not really "collateral". That suggestion is manifestly unsound. Of course, any order may conceivably have some bearing on the handling of the case by counsel and in that sense be said potentially to affect the outcome on the merits. But that obviously is not the sense in which the collateral nature of an order is to be tested under *Cohen*. For example, an order setting excessive bail would affect the defendant's ability to aid counsel in preparation of the case, yet such orders are appealable under the *Cohen* doctrine. See *Stack v. Boyle*, 342 U.S. 1 (1951). Indeed, even the question whether security for costs need be posted (the very issue

(footnote continued on following page)

argument,[3] it is necessary to focus on the nature of the injury posed by Risjord's role.

Because Risjord's actions (including his tactical and strategic choices) must inevitably be colored by his awareness of their impact upon his firm's longstanding client Home (whose efforts to avoid coverage are premised on Risjord's intentional tort theory), the very presence of Risjord inevitably taints the proceedings. In essence, there is injected into the case a contaminating element — the interest of Home in avoiding coverage — which tends to deflect the progress of the case from the course it would follow if pursued by counsel freed of Risjord's differing interests. That very fact is irreparably injurious to the interests of Firestone, to the interests of the Risjord plaintiffs, and to the public interest, all of which require that the case be pursued free of any such contaminants.

It is not a valid answer to these concerns to suggest that one cannot predict in advance precisely what effect the contamination will have on the outcome of the case or that Firestone might prevail in spite of or even because of that contamination. Neither Firestone nor the Risjord Plaintiffs may be compelled to take such a gamble, and even if they were so inclined (which Firestone emphatically is not) the public interest forbids it.[4] Moreover, the very difficulty of measuring the impact of the contamination on the end result,

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in *Cohen*) might be said to affect the outcome in this sense — *e.g.*, if a party failed to post security as directed, and was foreclosed from pursuing his case. What the *Cohen* test really addresses in this regard is whether the order in question determines "claims of right separable from, and collateral to, rights asserted in the action . . ." (*Cohen*, 337 U.S. at 546).

[3]Since the Government's arguments here are to some extent intertwined with its challenge to Firestone's standing, what is said in the latter context at Point II of this Brief applies here as well. The present discussion likewise bears on the argument at Point II below.

[4]In order to put the issue in clearer focus, assume that Home's General Counsel undertook to represent the Risjord Plaintiffs, and pursued theories in light of which Home purported to disclaim coverage. Could

and resulting difficulty in fashioning any meaningful post-judgment relief, argues persuasively for immediate appellate review. These difficulties are compounded by the fact that we deal here not merely with the victory or defeat of the parties *inter se* but also with the question of insurance coverage. Thus the "gamble" must be viewed not only in terms of the effect of Risjord's presence on the victory or defeat of the respective parties but also in terms of its effect on the prospects that any recovery (even if rendered more remote overall) would more likely be so fashioned as to enhance Home's prospects of defeating coverage. Even assuming Firestone prevails, the Risjord-Home factor may operate to its prejudice by requiring it to assume the burden of defending claims which but for the Risjord-Home factor might not have been pursued, or at the very least might have been jettisoned at an earlier stage. Certainly one can readily comprehend Firestone's refusal to be put "at risk" in this fashion or to be required to defend under these circumstances.

Nor can we fathom the Government's professed inability to comprehend the difficulty of ascertaining at the post-judgment phase precisely how the taint of the Risjord-Home relationship may have affected the myriad tactical and strategic judgments Risjord eventually must confront. It is unlikely that even Risjord himself could measure that influence.

Therefore, while we do not subscribe to the Government's proposed selective approach to appealability (see *United States v. MacDonald*, 435 U.S. 850, 857, note 6 (1978)), even if such an approach were adopted, the present case

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it seriously be contended that the consent of Home and the Risjord Plaintiffs would obviate the taint inherent in such a course or that to sanction such a practice would not irreparably sully the administration of justice?

would be a particularly deserving candidate for review.[5] Indeed, the arguments urged by the Government in favor of appealability in other contexts (*e.g.*, the difficulty of proving prejudice, and the impairment to the judicial process which cannot be redressed even if the party seeking disqualification ultimately prevails) generally apply here also, notwithstanding the Government's assertion to the contrary.

II.

THE GOVERNMENT'S CHALLENGE TO FIRESTONE'S STANDING IS NOT WELL TAKEN.

Much of the Government's Brief is devoted to challenging Firestone's standing to seek Risjord's disqualification. In essence, the Government urges that there is no important public interest at stake nor a sufficient private interest in that Firestone itself has not been a client of Risjord. Actually, neither of the Government's premises is sound.

The motion for disqualification does seek to vindicate an important public interest, as reflected in the authorities (including cases in the Federal courts involving *both* civil and criminal litigation) deriving standing from the duty of an attorney to bring such matters to the court's attention. See Petitioner's Reply Brief, pp. 12-13.

But it is unnecessary to ground Firestone's standing on the public interest factor alone, for the conflict of which Firestone complains does raise concerns personal to it. Firestone's own legal interests are at stake here, and Firestone is threatened with injury "peculiar to itself." It does not

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[5]The Government Brief states (p. 21, note 18) that the present case lacks an "objective factor" assuring the good faith of the appeal. While the Government's proposed test of "objectivity" is unclear, it seems difficult to conceive of a more objective factor than the relationship undisputably here present: i.e., the fact that plaintiffs' counsel is linked to defendant's insurer and is asserting a theory upon which the insurer purports to disclaim coverage.

seek only to prevent injury to the public. And while the authorities cited at page 13 of Petitioner's Reply Brief indicate that Firestone would have standing even if not directly affected, the fact that it is directly affected obviously strengthens its position in this regard. In short, the Government's premise that Firestone is acting merely as a private attorney general is erroneous.

Here it is essential to note that we are dealing with a situation involving at least *three* private interests: those of the Risjord Plaintiffs, Firestone and Home. Accordingly, an analysis (such as that of the Government in contending that DR5-105 does not protect the opposing party) premised on situations in which only two private interests are involved is likely to be sterile. Viewed in terms of the three private interests here involved, it can readily be seen that Firestone (as well as the Risjord Plaintiffs) has an interest in the conflict posed by Risjord's role as counsel for the Risjord Plaintiffs; *i.e.*, Firestone and the Risjord Plaintiffs are both at risk.[6]

Nor does the mere fact that Firestone has not been a client of Risjord *per se* negate Firestone's interest or standing.

Apropos here is *Sapienza v. New York News, Inc.*, 481 F.Supp. 676 (S.D.N.Y. 1979), where an attorney representing plaintiffs and defendant A was successfully challenged by defendant B despite the consent of plaintiffs and A. In upholding the challenge, the court explained:

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[6]The Government's suggestion that Firestone be relegated to a suit against Home likewise will not bear analysis. The conflict of interests which Risjord confronts and the resulting need for his disqualification pose a question separate and apart from the question whether Home is accountable to Firestone for Home's conduct in the matter. And clearly the most appropriate place to determine the effectiveness of the consent approach which Firestone here challenges is the very proceeding in which those consents are ostensibly being relied on.

> ". . . The Code's exception to the general prohibitions against representing multiple clients with differing interests requires not only that the parties consent, but also that it be 'obvious' that the lawyer can adequately represent the interests of each client. [citing Disciplinary Rule 5-105(C) and case authority.]"

Noting the public interest considerations involved, the court observed:

> ". . . In addition to concern about adequate representation of the clients, concern about the 'confidence and respect of the community towards its bench and bar' supports disqualification of counsel in some cases, even where the parties have consented to the multiple representation. *Estate Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F.Supp. 93, 98-99 (S.D.N.Y. 1972). This case involves circumstances particularly likely to undermine such confidence and respect of the community." (481 F.Supp. at 680).

Nor do the cases cited by the Government suggest a contrary result.

In *United States v. Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979), the question posed was whether criminal defendant A had standing to complain of prosecutorial misconduct against co-defendant B, the prosecutor having had contacts with B without consulting B's counsel. The complaining party (unlike Firestone here) had no direct personal interest at stake. And (again unlike the present case) there was no overriding public interest to be served. The same factors serve to distinguish *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (note 19) (1976) (A seeks to litigate tax liability of B) and *Warth v. Seldin*, 422 U.S. 490 (1975) (challenge to zoning practices).

In *Association of Data Processing Service Organizations, Inc. v. Camp.*, 397 U.S. 150, 157 (1970), cited by the

Government, the Court held that sellers of data processing services *did* have standing to challenge a ruling that national banks might provide such services. Standing likewise was found to exist in *Village of Arlington Heights v. Metropolitan Housing Devpt. Corp.*, 429 U.S. 252 (1977).

III.

THE GOVERNMENT'S POSITION ON THE MERITS IS NOT WELL TAKEN.

The Government's comments on the merits not only appear inapposite (in terms of any amicus interest of the Government) but are not well taken in any event.

1. In arguing for the viability of a consent approach, the Government fails to take proper account of the fact that there are three private interests involved here, of which at most two have "consented".[7]

Nor is the situation here analogous to that in *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978), cited by the Government. That case involved the propriety of government counsel representing certain air traffic controllers who were named as co-defendants with the United States. The appellate court found no conflict of interest precluding such multiple representation and then stated that even if there had been, under the facts it was obviated by the consent of the defendants. The gist of plaintiffs' challenge (rejected by the appellate court) was said to be that joint representation would make the defense more effective — a matter as to which the court felt plaintiffs could not legitimately complain. The court's broad language to the effect that DR5-105 is merely designed to protect "clients" and that the impact of multiple representation upon the opposing party is "irrelevant" was unnecessary

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[7]In addition, of course, there is the public interest to be considered.

to the decision and obviously does not really address the very different situation presented here.

2. The Government argues that Disciplinary Rule 5-105 is not necessarily a touchstone for disqualification.[8] The simplest answer to that argument is that (as the Government itself acknowledges at p. 24, note 20 of its Brief) the trial court itself looked to DR5-105 as a touchstone in ruling on the motion to disqualify and in fact purported to ground its "consent" approach on that very Rule. Beyond this, as noted in *Brennans, Inc. v. Brennans Restaurants, Inc.*, 590 F.2d 168, 172, note 5 (5th Cir. 1979) (a case cited by the Government in another context): "As the profession's own expression of its ethical standards, the Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules provide substantial guidance to federal courts in evaluating the conduct of attorneys appearing before them. [Citing cases]." Moreover, in the present context, the *principles* reflected in DR5-105 (principles which transcend that Rule and would exist independently of it) cannot be vindicated except in the context of disqualification.

3. The Government suggests that the trial court should be given discretion to determine what effect the conflict of which Firestone complains may affect Risjord's "vigor". While we do not believe that the impact of a conflict upon the vigor of counsel could be gauged even in a context where that measure were relevant, actually the gist of the challenge to Risjord does not turn on the mere degree of

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[8]The argument that such matters ought to be left solely to disciplinary proceedings has been rejected; instead, it has been recognized that the courts bear responsibility for supervision of the conduct of members of their Bars. See, *e.g., Hull v. Celanese Corp.* 513 F.2d 568, 571 (2d Cir. 1975).

his vigor, as the Government's argument tacitly assumes, but rather on whether any such "vigor" may be directed, consciously or unconsciously, to Home's ends.

Conclusion.

In addressing the question of appealability, the Government appears constrained by its own conflicting interests to resort to a somewhat tortured analysis which does not really point to a viable solution. In addressing the conflict of which Firestone complains, the Government, which is a relative latecomer to these proceedings, appears to misconceive the basic thrust of Firestone's position. Accordingly the Government Brief does not shed any meaningful light on the issues which the Court confronts in the present case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

IN RE: MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION
FIRESTONE TIRE & RUBBER COMPANY, PETITIONER

v.

JOHN C. RISJORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether an order denying a motion to disqualify opposing counsel in a civil case between private parties may be appealed under 28 U.S.C. 1291, where the party moving for disqualification has never had an attorney-client relationship with opposing counsel on matters relating to the case that could be irreparably impaired by counsel's continued participation.

2. Whether, if such an order denying disqualification may be appealed, the district court properly denied the motion to disqualify in this case, where the clients to whom the attorney assertedly owed conflicting loyalties consented to the representation.

TABLE OF CONTENTS

	Page
Interest of amicus curiae	1
Statement	1
Summary of argument	5
Argument:	
I. The order denying disqualification was not appealable under 28 U.S.C. 1291 because, even assuming petitioner's standing to prosecute an appeal, the claim for disqualification in this case should be reviewable only on appeal from final judgment	9
A. It is doubtful that petitioner had standing to move for disqualification and prosecute an appeal	9
B. The order denying disqualification in this case was not a "collateral order" appealable under 28 U.S.C. 1291	18
II. The court of appeals properly declined to overturn the district court's order on the merits	26
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 ..... 18, 19, 20, 22, 24
Aetna Casualty & Surety Co. v. *United States*, 570 F.2d 1197 ..... 29, 30
American Roller Co. v. *Budinger*, 513 F.2d 982 30
April 1977 Grand Jury Subpoenas, In re, 584 F.2d 1366, cert. denied, 440 U.S. 934 25-26
Arkansas v. *Dean Foods Products Co., Inc.*, 605 F.2d 380 5
Armstrong v. *McAlpin*, No. 79-7042 (2d Cir. June 20, 1980) 19, 27, 28, 30
Armstrong v. *McAlpin*, 606 F.2d 28 30

PREVIOUS PAGE WAS BLANK

Cases—Continued

	Page
Berger v. *United States*, 295 U.S. 78	15
Blackledge v. *Allison*, 431 U.S. 63	17
Board of Education v. *Nyquist*, 590 F.2d 1241	28
Brennan's Inc. v. *Brennan's Restaurants, Inc.*, 590 F.2d 168	31
Brewer v. *Williams*, 430 U.S. 387	17
Carroll v. *United States*, 354 U.S. 394	19, 26
Cessna Distributorship Antitrust Litigation, In re, 532 F.2d 64	20
Church of Scientology of California v. *McLean*, 615 F.2d 691	22
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	5, 7, 18, 19
Community Broadcasting of Boston, Inc. v. *FCC*, 546 F.2d 1022	
Coopers & Lybrand v. *Livesay*, 437 U.S. 463	18
Corrugated Container Antitrust Litigation, In re, 611 F.2d 86	19
Cuyler v. *Sullivan*, No. 78-1832 (May 12, 1980)	10, 14, 17, 29
Data Processing Service v. *Camp*, 397 U.S. 150	12
Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562	22
Fred Weber, Inc. v. *Shell Oil Co.*, 566 F.2d 602, cert. denied, 436 U.S. 905	5
Faretta v. *Califano*, 422 U.S. 806	15
Fund of Funds, Ltd. v. *Arthur Andersen & Co.*, 567 F.2d 225	22
General Electric Co. v. *Valeron Corp.*, 608 F.2d 265	22
Gopman, In re, 531 F.2d 262	29
Gladstone Realtors v. *Village of Bellwood*, 441 U.S. 91	12
Glasser v. *United States*, 315 U.S. 60	14
Grand Jury Proceedings, In re, 580 F.2d 13	26
Grand Jury Subpoena Served on John Doe, In the Matter of, 546 F.2d 498	26
Grinnell Corp. v. *Hackett*, 519 F.2d 595, cert. denied, 423 U.S. 1033	19
Holloway v. *Arkansas*, 435 U.S. 475	14, 17

Cases—Continued

Page

In the Matter of the Special February 1977 Grand Jury, 581 F.2d 1262 ..... 16, 18, 25
Investigation Before the February 1977, Lynchburg Grand Jury, In re, 563 F.2d 652 18
Kroungold v. *Triesler*, 521 F.2d 763 30
Melamed v. *ITT Continental Baking Co.*, 592 F.2d 290 11
Musicus v. *Westinghouse Electric Co.*, No. 79-1067 (July 15, 1980) 22
Novo Terapeutisk Laboratorium v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 ..... 22, 30
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 12
Standefer v. *United States*, No. 79-383 (June 9, 1980) 15
Taylor, In re, 567 F.2d 1183 16
Trone v. *Smith*, No. 77-1832 (9th Cir. June 23, 1980) 22, 30
United States v. *Denson*, 588 F.2d 1112, vacated on other grounds, 603 F.2d 1143 26
United States v. *Dionisio*, 410 U.S. 1 18
United States v. *Dolan*, 570 F.2d 1177 16
United States v. *Garcia*, 517 F.2d 272 16
United States v. *MacDonald*, 435 U.S. 850 ..18, 19, 20, 21
United States v. *Miller*, No. 79-2445 (June 26, 1980) 27
United States v. *Nixon*, 418 U.S. 683 18
United States v. *Partin*, 601 F.2d 1000 11
United States v. *Standefer*, 610 F.2d 1076 15
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 12
Warth v. *Seldin*, 422 U.S. 490 12
Westinghouse Elec. Corp. v. *Gulf Oil Corp.*, 588 F.2d 221 22
Will v. *Calvert Fire Ins. Co.*, 437 U.S. 655 25
Will v. *United States*, 389 U.S. 90 25
Woods v. *Covington County Bank*, 537 F.2d 804.... 30
Yarn Processing Patent Validity Litigation, In re, 530 F.2d 83 11

Constitution, statutes and rules: Page

United States Constitution:

Fifth Amendment, Double Jeopardy Clause.. 17, 26
Sixth Amendment 1, 6, 14, 15, 16-17

18 U.S.C. 207 ..... 1, 22, 27
18 U.S.C. 3731 26
28 U.S.C. 1291 ..... *passim*
28 U.S.C. 1292(b) 3
28 U.S.C. 1651 25
Federal Rules of Civil Procedure:

Rule 12(b)(6) 20
Rule 54(b) 20

Rule 43 of Local Rules of District Court for Western District of Missouri 3

Miscellaneous:

ABA Code of Professional Responsibility (1969):

Canon 4 24
DR 5-105 ..... 3, 6, 12, 14, 22, 27, 28
DR 5-105(A) 3, 10
DR 5-105(B) 10
DR 5-105(C) 10
DR 7-104 28
DR 9-101(B) 1, 22, 27

ABA Committee on Professional Ethics, *Formal Opinion 342*, 62 A.B.A.J. 517 (1976) 22
ABA Standards Relating to the Administration of Criminal Justice, The Defense Function (1974).. 14
Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978) 15, 16
Note, *Appealability of Orders Relating to Ongoing Grand Jury Proceedings*, 92 Harv. L. Rev. 931 (1979) 26
Sutton, *How Vulnerable Is the Code of Professional Responsibility?* 57 N.C. L. Rev. 497 (1979) 28

INTEREST OF AMICUS CURIAE

This case presents important questions concerning the appealability of orders denying motions to disqualify counsel and the appropriate standards to be applied by a federal district court in ruling on motions to disqualify. Issues of attorney disqualification arise with some frequency in litigation involving the government. In both civil and criminal cases, it occasionally becomes necessary for the government to move for the disqualification of an attorney formerly employed by the government in connection with the same matter. See 18 U.S.C. 207; American Bar Association, *Code of Professional Responsibility*, DR 9-101(B). The government will also move for the disqualification of counsel representing multiple witnesses before a grand jury or potential targets of a grand jury investigation where counsel has a conflict of interest that could deny a particular witness vigorous and individualized representation and deprive the public and the grand jury of his testimony or cooperation. Similarly, the government will occasionally move for disqualification of counsel representing multiple defendants in a criminal trial in order to ensure protection of each defendant's Sixth Amendment right to the effective assistance of counsel and to preserve the integrity of the criminal justice process. Parties opposing the government in litigation sometimes move for disqualification of government counsel as well.

The outcome of this case could have a significant impact upon the disposition of disqualification issues in government litigation.

STATEMENT

1. Respondent Risjord is counsel for plaintiffs who have sued petitioner Firestone Tire & Rubber Company and other manufacturers of multi-piece truck tire rims in four separate actions seeking damages for personal injuries sustained as a result of alleged defects in the rims (J.A. 12, 28, 52, 60). These four cases are part of multidistrict proceedings consolidated in the United

States District Court for the Western District of Missouri pursuant to 28 U.S.C. 1407 (J.A. 73-80). At the time most of the injuries were sustained, Home Insurance Company (Home) was the liability insurer for petitioner under a policy that renders Home responsible for any liability in excess of a certain "deductible" amount, generally $50,000 (J.A. 150).

The plaintiffs represented by respondent alleged that petitioner (along with other defendants) had "negligently, willfully or intentionally" failed to redesign the rims knowing of their defects, to recall defective rims, to warn of hazards, and to advise the government of hazards and other pertinent information, and that petitioner had engaged in other conduct that caused the injuries or failed to prevent them (J.A. 14-15, 26, 30-32, 40-41, 52-54, 63-65). The plaintiffs also sought exemplary damages (J.A. 23-24, 38, 42, 54, 60, 66, 71-72).

By letters sent in October 1978 and November 1979, Home informed petitioner that Home's policy would not cover any award of compensatory damages to the plaintiffs represented by respondent based on willful or intentional acts by petitioner and would not cover any award of punitive damages (J.A. 113-116, 198-199). Home sent similar letters in April 1979 regarding suits brought by plaintiffs who were not represented by respondent (J.A. 117-123).

2. On May 29, 1979, petitioner moved in district court for the disqualification of respondent and his law firm, contending that respondent had a conflict of interest because Home, which could be liable under its insurance policy for damages awarded in this case, was a client of respondent's law firm (A. 104-106). The law firm listed Home as one of its clients in the Martindale-Hubbell Law Directory and had been employed by Home on a case-by-case basis in matters unrelated to the present case, but the firm did not receive a retainer fee from Home (Pet. App. 1-2). Respondent was defending Home in only one case at the time petitioner filed its disqualification motion—a suit on fire insurance policies against Home and five

other carriers in which Home held 10% of the total coverage. *Cannova Enterprises, Inc. d/b/a Mr. C's 103* v. *Home Insurance Co., et al.*, No. 782397 (Cir. Ct., Jackson Co., Mo.). See Pet. App. 2; J.A. 170-171.

On the basis of these facts, the district court concluded that petitioner would be required by Disciplinary Rule 5-105 of the *Code of Professional Responsibility*[1] to terminate his representation of plaintiffs in the instant litigation or his representation of Home in the *Cannova Enterprises* case, unless respondent's clients in each case consented to his continued representation (Pet. App. 2, 4-5). The court found it likely that there could be some "adverse effect," within the meaning of DR 5-105(A), on respondent's exercise of his independent judgment in one case or the other as a result of his taking a position adverse to Home in the present case, and that his representation in the two cases should therefore be undertaken only with the full knowledge and consent of his clients (Pet. App. 4-5).

Respondent subsequently filed an affidavit with the court stating that he had "fully informed" Home and the plaintiffs below "of the purported apparent conflict and the nature of the litigation involved therein, and has obtained their informed consent to continued representation" (J.A. 168-169). Respondent also filed affidavits of consent signed by a representative of Home and by his clients in this case (J.A. 170-183). After respondent filed the affidavits, petitioner filed a notice of appeal[2] from

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[1] DR 5-105 of the *Code of Professional Responsibility*, as adopted by the Missouri Supreme Court and incorporated in Rule 43 of the Local Rules of the District Court for the Western District of Missouri, is reproduced at Pet. App. 2-3.

[2] The district court, after making the requisite findings, certified its disqualification order for immediate appeal pursuant to 28 U.S.C. 1292(b). Respondent chose to obtain his clients' consent rather than appeal. Petitioner did not file an application with the court of appeals to permit an appeal of the district court's order, as required by 28 U.S.C. 1292(b), but instead filed the instant appeal under 28 U.S.C. 1291.

the district court's previous order permitting respondent's representation (J.A. 184-185).

3. On October 25, 1979, while its appeal to the Eighth Circuit in the present case was pending, petitioner filed an action against Home in the district court below alleging that Home's consent to respondent's representation of plaintiffs in the instant proceedings constituted a breach of fiduciary duty owed to it by Home (J.A. 21-221). Petitioner suggested in its complaint that Home's consent might have been motivated by its desire to aid respondent in establishing that petitioner committed intentional torts not covered by Home's insurance policies, and thereby to relieve Home of potential liability. Petitioner alleged as well that Home had demanded and received access to all of petitioner's rim and wheel case files and had discussed defense strategy in these cases with petitioner's attorneys. Petitioner asserted that potential collusion between Home and respondent could lead to a misuse of this information against petitioner (J.A. 218-220). Petitioner sought an order barring Home from disclaiming liability for compensatory and punitive damages in the instant litigation and preventing Home from giving its consent to respondent's representation, and an award of compensatory and punitive damages for respondent's alleged breach of fiduciary duty (J.A. 220-221). We understand that no decision has been reached in this separate action.

4. On November 6, 1979, also while the appeal in the present case was pending, Home sent respondent a letter requesting that he and his firm withdraw from their defense of Home in the *Cannova Enterprises* case because their participation in that case had given rise to an unwarranted expenditure of time and money in litigating the propriety of respondent's representation of plaintiffs in the present proceedings. Home stated in its letter, however, that respondent had not had and would not have access to information petitioner had furnished to Home regarding its products (J.A. 191-192; see also J.A. 171). Respondent promptly withdrew from his representation of Home in the case (J.A. 190), but not

from his representation of the other five carriers (Motion to Supplement the Record, at 2). The *Cannova Enterprises* case was resolved and dismissed with prejudice pursuant to stipulation of the parties filed in state court on May 28, 1980 (Motion to Supplement the Record, Exh. C). Neither respondent nor his firm has represented Home in any matter since they withdrew from the *Cannova Enterprises* case on November 7, 1979 (*ibid.*).

5. On appeal in the present case, the Eighth Circuit, sitting *en banc*, held in a brief opinion (Pet. App. 8-9) that an order denying a motion to disqualify counsel may not be appealed pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine recognized by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[3] However, because the court overruled prior circuit precedent holding such orders appealable,[4] the court applied its holding prospectively and therefore reached the merits of the disqualification issue in the present case. In its one-sentence discussion of the merits, the court stated that it had "carefully reviewed the pleadings, and briefs" and "concluded that the district court did not abuse its discretion in refusing to disqualify counsel" (Pet. App. 10).

SUMMARY OF ARGUMENT

I

The order denying petitioner's motion to disqualify respondent was not immediately appealable under 28 U.S.C. 1291 because petitioner's claim could be adequately reviewed on appeal from an adverse final judgment.

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[3] The court stated (Pet. App. 9), however, that orders *granting* disqualification motions would continue to be appealable under the collateral order doctrine.

[4] See *Arkansas* v. *Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F.2d 602, 606-607 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978).

A. As an initial matter, there is a substantial question whether petitioner had standing to move for disqualification and to prosecute its appeal. The district court required respondent to obtain the consent of Home and plaintiffs below as a condition to his continued representation of plaintiffs in this case, out of concern that his independent judgment on behalf of plaintiffs below and of Home in the *Cannova Enterprises* case might be adversely affected by the simultaneous representation. We do not question petitioner's right to call to the district court's attention conduct by respondent that petitioner believed to be unethical. But once respondent's clients consented to the simultaneous representation in these private civil cases, it is not clear why petitioner—which is not and has never been a client of respondent on any matters related to either lawsuit—has legal standing to prosecute an appeal in order to deny plaintiffs below the counsel of their choice. DR 5-105 of the *Code of Professional Responsibility*, invoked by petitioner, was designed to protect the attorney's clients, not third parties.

Different considerations would be involved, however, in the case of joint representation of multiple defendants in a criminal trial or witnesses and targets in a grand jury investigation. In these circumstances, the government has standing to move for disqualification of counsel having conflicting interests and, where appropriate, to prosecute an appeal from a denial of the motion. Joint representation of defendants who have conflicting interests at trial can result in a violation of a defendant's Sixth Amendment right to effective assistance of counsel. In addition, beyond the personal rights at stake, there is a vital public interest in the integrity of our system of criminal justice that is not present in a dispute between private parties, and that integrity could be seriously undermined by conflicts of interest. Joint representation may also prevent one of several jointly represented defendants or grand jury witnesses from being adequately advised about the advantages of cooperating in an investigation or prosecution, where that coopera-

tion would entail the giving of evidence against others. For these reasons, the prosecutor—on behalf of the public and to see that justice is done—has a duty to move for disqualification to prevent conflicts of interest that threaten to obstruct the criminal justice process and has standing to prosecute an appeal.

B. The Court need not reach the standing question in this case, however, because it is clear that the order denying disqualification was not appealable pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. We may assume that the order satisfies the first two criteria of the *Cohen* test—i.e., that it addresses an issue separate from the merits of this products liability litigation, and that the district court conclusively determined the issue when it denied the motion for disqualification. But the order does not satisfy the third prong of the *Cohen* test, because petitioner's claim would not be irreparably lost if review were postponed to an appeal from a final judgment.

It is important to note in this regard that petitioner does not rest its disqualification claim on a past attorney-client relationship with respondent in the course of which confidential information relevant to the present case may have been disclosed. If that were the claim, it is arguable that review on appeal from final judgment would not be adequate because the parties and the court would be required to explore the attorney-client relationship to determine whether confidential information had affected the outcome of the case and because disclosures of confidences during the course of the first trial (or even the violation of the attorney-client relationship occasioned by the mere risk of such disclosure) could not be fully repaired if the court of appeals reversed and remanded for a new trial conducted by different counsel. Here, however, the claim is simply that respondent might advance its intentional tort theory (under which Home might not be liable on its insurance policy) rather than certain alternative theories. Petitioner's concern about

this possibility would be entirely mooted if petitioner were not found liable at all, or were held liable on grounds other than intentional tort. If petitioner *is* held liable on an intentional tort theory, that judgment could be reviewed on appeal. Such review could encompass petitioner's claim that it was prejudiced by respondent's alleged conflict of interest—a claim that would be far easier to assess with the benefit of a full trial record reflecting the manner of respondent's representation of the plaintiffs and the likelihood that such representation was improperly affected by a conflicting obligation to Home. Reversal on appeal from the final judgment would fully remedy any injury to petitioner from the asserted ethical violation.

Again, however, different considerations would be present where a district court denies the government's motion to disqualify a lawyer representing clients with conflicting interests in grand jury proceedings or in a criminal trial. The government has no right of appeal from the grand jury's failure to indict or from a judgment of acquittal. The disqualification issue would therefore be irreparably lost if the government could not prosecute an immediate appeal in the grand jury context or, to the extent it has appeal rights, prior to trial of a criminal case.

II

If the Court reaches the merits of the disqualification issue, we believe the court of appeals properly declined to reverse the district court's order denying disqualification in this case. In taking this position, we express no view on the ethical propriety of respondent's conduct.

Federal courts should disqualify an attorney in private civil litigation only where necessary to preserve the integrity of the judicial process in cases pending before them—such as where a conflict of interest undermines the court's confidence in the vigor of the attorney's representation on behalf of a party or where the attorney may be in a position to use confidential information against the other side. The courts may properly rely

on disciplinary proceedings to remedy other ethical improprieties by attorneys. We believe the district court acted properly in assuring itself that both plaintiffs below and Home were aware of and consented to respondent's simultaneous representation of them. In view of that consent, and in the absence of extraordinary circumstances not present here, the court of appeals did not err in declining to overturn the district court's order.

ARGUMENT

I

THE ORDER DENYING DISQUALIFICATION WAS NOT APPEALABLE UNDER 28 U.S.C. 1291 BECAUSE, EVEN ASSUMING PETITIONER'S STANDING TO PROSECUTE AN APPEAL, THE CLAIM FOR DISQUALIFICATION IN THIS CASE SHOULD BE REVIEWABLE ONLY ON APPEAL FROM FINAL JUDGMENT

A. It Is Doubtful That Petitioner Had Standing To Move For Disqualification and Prosecute An Appeal

Before turning to the question whether the district court's order denying disqualification was appealable under 28 U.S.C. 1291, there is a threshold question, argued by respondent below (Appellee Br. 14-17), whether petitioner has standing to prosecute this appeal.[5] The basis of the district court's order requiring respondent to obtain the consent of Home and the plaintiffs below as a condition to remaining in this case was its concern that respondent's simultaneous representation of Home in the *Cannova Enterprises* case, which concerned wholly un-

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[5] Another threshold question is whether the appeal is now moot in view of respondent's withdrawal from representation of Home in the *Cannova Enterprises* case and the subsequent termination of those proceedings. Petitioner contends (Pet. Br. 3-4 n.7) that these occurrences are of no moment because of what it characterizes as the "deeply rooted relationship" between respondent and Home and the possibility that respondent's conduct favoring Home in the present case could induce Home to give his firm business in the

related issues under a fire insurance policy, might adversely affect his judgment on behalf of the plaintiffs below (Pet. App. 2-5). We have considerable doubt that petitioner, which is not and has never been a client of respondent, is in a position to complain of such an alleged conflict of interest as it may affect others who *are* respondent's clients—particularly where, as here, the clients themselves have consented to the simultaneous representation [6] and there are no countervailing public interests weighing against multiple representation.

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future. Although the possibility of legally cognizable injury to petitioner seems somewhat speculative, we believe, on balance, that petitioner's assertions prevent the appeal from being moot.

[6] This case does not present an instance of *joint* representation of multiple parties in the same case, in which the attorney may be confronted with an obligation to take mutually inconsistent positions on behalf of his separate clients or advise a course of action for one client that could injure the interests of another. Where such an actual conflict exists, it would be obvious that the attorney cannot "adequately represent the interest of each" client. ABA *Code of Professional Responsibility*, DR 5-105(C). Under established ethical rules of the bar, a lawyer ordinarily should not continue his joint representation in such a case (DR 5-105(A) and (B)), although even then it is not clear that a court should enforce these rules by disqualifying the attorney upon the motion of the *opposing* party in a private civil action, where the attorney's own clients in the case have given their informed consent to the joint representation (see pages 26-30, *infra*). As explained in the text, it is also not clear that the opposing party would have standing to prosecute an appeal from a denial of a motion to disqualify in these circumstances.

The present case involves not joint representation of parties in the same case, but simultaneous representation of clients in different, wholly unrelated proceedings. This reduces the potential for a divergence of interests. *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 12. Although any position advanced by respondent on behalf of

We do not question the right—indeed the duty—of an attorney to call an ethical violation by opposing counsel to the attention of the court, even where that violation will have no effect upon the attorney opposing the violation, or upon his client. See, *e.g.*, *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290, 294 (6th Cir. 1979). Nor do we question the inherent right of a district court to disqualify an attorney in appropriate circumstances when an ethical violation has been called to its attention, whether by a party to the litigation or by someone else. But where the only possible conflict of interest does not involve any breach of duty owed by the attorney to the party seeking his disqualification or otherwise implicate important public interests in the proceedings themselves, we question whether the moving party has standing, as such, to move for disqualification and to prosecute an appeal from the denial of the motion. *Ibid.*; *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 84-90 (5th Cir. 1976); *United States* v. *Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979).[7]

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the plaintiffs below might redound to the detriment of Home *in this case*, that fact is not determinative because Home is not respondent's client in this case. There seems to have been virtually no possibility that factual or legal positions taken by respondent in the proceedings below would have effectively foreclosed respondent from taking any position on behalf of Home in the *Cannova Enterprises* litigation, in which Home was his client. Thus, the only inhibition on respondent's representation that could result from the simultaneous representation is that respondent might feel some subjective restraint in his advocacy on behalf of plaintiffs because of present or past (or, perhaps, prospective) affiliations with Home. Because these possible effects on the attorney are so subjective and difficult of proof in circumstances of simultaneous representation (where mutually inconsistent positions need not be taken), a court should be reluctant to override the consent of the clients on this ground.

[7] The standing issue would arise, of course, whether the appeal is taken from the order denying disqualification or from a final judgment in the case.

We assume, for present purposes, that petitioner has alleged sufficient injury-in-fact resulting from respondent's allegedly illegal conduct—*i.e.*, the possibility that respondent might highlight the intentional tort theory favorable to Home—to satisfy this aspect of the traditional standing test. See, *e.g.*, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). However, this Court has developed certain prudential principles which place additional limitations upon the ability of persons to invoke the power of the federal courts. Under these principles, a litigant ordinarily must assert his own legal interests, rather than those of a third party, and must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens. *Id.* at 98-99; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-264 (1977); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975).

Ethical rules, such as DR 5-105, governing conflicts of interest serve two purposes that might be furthered by granting a motion to disqualify counsel. Most immediately, these rules protect the interests of each individual lawyer's own clients. But petitioner is not and has never been respondent's client, and under the prudential limitations on standing just discussed, it does not appear that petitioner may rest its standing to raise and appeal the disqualification issue on the rights of third parties, plaintiffs below, who *are* respondent's clients. To be sure, petitioner alleges that it may be injured by respondent's conduct in this litigation if it is found liable on an intentional tort theory, and such an injury would be peculiar to petitioner. But DR 5-105 was not designed to protect an opposing party in litigation. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976); *Data Processing Service* v. *Camp*, 397 U.S. 150-157 (1970). Indeed, it has precisely the contrary purpose of ensuring a vigor-

ous presentation by counsel *against* the opposing party. Thus, it can be argued that a private party has no legal interest in his opponent's choice of counsel sufficient to confer standing.

Ethical rules respecting conflicts of interest also further the broader public interest in preserving the integrity of the bar and the confidence of the public in that integrity. Any injury petitioner might suffer as a result of an impairment of the integrity of the bar or public confidence, however, would not be distinct from the injury suffered by the public generally, and thus cannot furnish the basis for petitioner's standing here.

There are, moreover, substantial reasons to adhere to the prudential limitations on standing in a private civil case such as this. For where the party moving for disqualification does not rely on a possible impairment of his own attorney-client relationship with the particular attorney, but relies instead on a private attorney general theory to enforce the ethical rules of the bar, there is far greater cause for concern that the party has sought disqualification for tactical reasons or for purposes of delay. Such conduct itself would undermine the very integrity of the bar that ethical principles were designed to protect. If the court chooses not to disqualify counsel in such a case when an alleged ethical violation has been called to its attention, it may be preferable, on balance, to rely on established disciplinary procedures or other measures to further the public interest in preventing and remedying ethical violations, rather than conferring a right of appeal on the opposing party.

2. Quite different considerations are raised, however, where a single attorney or law firm represents multiple defendants in a criminal case or witnesses and targets in a grand jury investigation. In our view, where such joint representation gives rise to a conflict of interest, the government clearly has standing—through the public's Attorney General—to move for disqualification and to prosecute an appeal from a denial of such a motion.

A lawyer representing several criminal defendants who have conflicting defenses is required by established ethical principles to withdraw from the case, even where the defendants consent to the joint representation, because his clients' consent does not excuse the lawyer from his duty to exercise independent judgment on behalf of each or make it possible for him adequately to represent both. See *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 11 n.11, citing ABA *Code of Professional Responsibility*, DR 5-105 (1969); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 154-157 (1978).[8] The possible effect of such joint representation is of a wholly different order than that resulting from a conflict of interest in a dispute over private rights, as in the present case: joint representation of defendants having conflicting defenses in a criminal trial can result in the denial of a defendant's Sixth Amendment right to the effective assistance of counsel. *Cuyler* v. *Sullivan*, *supra*; *Holloway* v. *Arkansas*, *supra*; *Glasser* v. *United States*, 315 U.S. 60 (1942). Moreover, as the Court recently stated:

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[8] Indeed, Professor Geer, whose article was cited with approval by this Court in *Cuyler* v. *Sullivan*, *supra*, slip op. 11 nn.11 & 12, urges that joint representation be prohibited in all criminal cases and that the Code of Professional Responsibility be so construed. 62 Minn. L. Rev. at 157-162. This Court noted in *Cuyler* (slip op. 11 n.11) the strong policy against multiple representation espoused by most public defender offices responding to a recent survey. See also *Holloway* v. *Arkansas*, 435 U.S. 475, 486 n.8 (1978), quoting *ABA Standards Relating to the Administration of Criminal Justice, The Defense Function* § 3.5(b), at 123 (1974) (a lawyer should not undertake to defend more than one defendant where his duty to one "may conflict" with his duty to another; the potential for conflict is "so grave" that multiple representation should be avoided except where it is "clear that no conflict is likely to develop" and all defendants consent).

> [T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater [in most cases than the public interest in the outcome of a particular civil trial].

Standefer v. *United States*, No. 79-383 (June 9, 1980), slip op. 14, quoting *United States* v. *Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc). Thus, there is a vital public interest in the integrity of our system of criminal justice and of the defense bar—and in preserving the public confidence in that integrity—that is not present in a case between private parties. The prosecutor accordingly has an obligation, on behalf of the public and to ensure that justice is done, to move for disqualification of defense counsel who is confronted with a conflict of interest. Cf. *Berger* v. *United States*, 295 U.S. 78, 88 (1935).[9]

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[9] Individual defendants may be held to have *waived* their Sixth Amendment right to the effective assistance of counsel in the sense that they are not entitled to have their convicions set aside on appeal or collateral attack if they knowingly and intelligently agreed to joint representation by an attorney despite their being informed of the possibility that a conflict of interest might arise. This does not mean, however, that the district court, in advance of trial, is precluded from disqualifying defense counsel who is confronted with a conflict of interest merely because the defendants *consent* to joint representation in the face of the conflict. It is true that a defendant has a Sixth Amendment right to defend against criminal charges personally, without the assistance of counsel. *Faretta* v. *California*, 422 U.S. 806 (1975). We submit, however, that where the defendant chooses to be assisted by counsel, he does not have a Sixth Amendment right to counsel of his choice if that counsel has a conflict of interest that undermines the integrity of the criminal justice system and the defense bar. Cf. *United*

There is also a strong public interest in ensuring that the investigation and prosecution functions are not impeded by joint representation of defendants. As one commentator has observed:

> [T]he interests of a defendant who is either innocent or less culpable than another may lie in cooperation with governmental authorities. If, however, one attorney represents all defendants accused of a criminal offense, this cooperation will be made much more difficult to obtain since it is likely to involve testimony against other defendants. Thus collective advocacy may frustrate the interests of both the individual defendant and the public by allowing the defendants collectively to construct a stone wall to obstruct governmental attempts at achieving cooperation.

Geer, *supra*, 62 Minn. L. Rev. at 156.[10] As a result, where the government is prepared to discuss the possibility of cooperation by one of several defendants represented by common counsel, in return for a grant of immunity or other favorable treatment, the government has a sufficient stake on this ground alone to seek disqualification of counsel and to prosecute an appeal if an appeal otherwise lies. Cf. *In the Matter of the Special February 1977 Grand Jury*, 581 F.2d 1262, 1264 (7th Cir. 1978).

The government has a more pragmatic interest in pursuing disqualification motions in this setting as well. Absent a waiver, a finding that an attorney representing several defendants had an actual conflict of interest will result in reversal of the conviction under the Sixth

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States v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978); but see, *e.g.*, *In re Taylor*, 567 F.2d 1183, 1186-1187 nn. 1 & 2 (2d Cir. 1977); *United States* v. *Garcia*, 517 F.2d 272, 276-277 (5th Cir. 1975).

[10] This concern is especially pronounced where one of the jointly represented defendants is in a position to dominate or intimidate co-defendants and to enlist the aid of counsel to this end.

Amendment. *Holloway* v. *Arkansas*, *supra*.[11] The prosecution must bear the burden of retrial even where it is not responsible for the constitutional violation. *Cuyler* v. *Sullivan*, *supra*, slip op. 7-9. The government's interest in the integrity of a judgment of conviction therefore also gives it a sufficient stake in the conflict of interest issue to pursue disqualification motions and, where possible, appeals from their denial.

Similar interests, conferring standing on the government, are at stake when an attorney represents a number of witnesses, targets, or a combination of both in connection with a grand jury investigation. Difficult questions may arise, for example, as to whether a particular witness or target should assert his Fifth Amendment privilege against self-incrimination. Although the Sixth Amendment right to effective assistance of counsel does not attach where an individual has not been indicted or formal criminal proceedings have not otherwise been initiated against him (*Brewer* v. *Williams*, 430 U.S. 387, 399 (1977)), the potential for criminal liability requires the attorney to be as sensitive to possible conflicts of interest when his client is called to testify before a grand jury or is under investigation as he would be after indictment. There is also an important public interest in preserving the integrity of legal representation in connection with grand jury proceedings and ensuring that joint representation of grand jury witnesses does not, through stone-

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[11] Reversal may occur even where the defendants purported to waive their Sixth Amendment right to effective assistance of counsel, if a court should later conclude that the waiver was not knowing and voluntary. Cf. *Blackledge* v. *Allison*, 431 U.S. 63 (1977). It is not apparent, however, that a final judgment in a civil case against one of several parties represented by the same attorney would be so readily reversed on appeal merely because the attorney had a conflict of interest in representing that party, at least where the prevailing party bore no responsibility for the conflict of interest. In the civil area, a suit by the losing party against his attorney for malpractice could provide full relief.

walling, impede the grand jury in pursuit of its right to obtain every person's evidence. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974).[12] Such conduct could "frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). See *In the Matter of the Special February 1977 Grand Jury*, *supra*, 581 F.2d at 1264; *In re Investigation Before the February 1977, Lynchburg Grand Jury*, 563 F.2d 652, 658 (4th Cir. 1977).

B. The Order Denying Disqualification In This Case Was Not A "Collateral Order" Appealable Under 28 U.S.C. 1291

The Court need not decide the standing issue in this case, however, because the order denying disqualification was not immediately appealable under 28 U.S.C. 1291 in any event.

1. Because an order denying a motion to disqualify counsel obviously does not terminate the litigation, such an order is appealable only if it falls within the "collateral order" exception to the final judgment rule articulated by the Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978). To qualify as a decision excepted from the final judgment rule by *Cohen*, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468, citing *United States* v. *MacDonald*, 435 U.S. 850, 855 (1978); *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

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[12] Nor can there be any serious suggestion that a motion by the government to disqualify counsel representing a number of grand jury witnesses or targets would be used for purposes of delaying the proceedings. Such an appeal would be intended to *further* the purposes of the grand jury investigation.

As explained below, we believe certain orders denying disqualification are appealable, because of the nature of the particular claim underlying the party's request for imposition of the disqualification remedy. But we do not believe petitioner's claim falls in that category.[13]

We may assume that the issue of disqualification of counsel here is separate from the merits of the underlying products liability litigation (but see note 17, *infra*) and that the district court "conclusively determined the disputed question" when it ruled that respondent could continue his representation in this case if he obtained the consent of Home and the plaintiffs below. But the order in this case does not satisfy the third criterion of the *Cohen* test, because the particular claim asserted by petitioner will not be irreparably lost if review is postponed to an appeal from final judgment.[14]

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[13] This Court has indicated that the appealability of orders under the collateral order doctrine should be decided in terms of categories, not on a case-by-case basis (*United States* v. *MacDonald, supra,* 435 U.S. at 857-858 n.6, citing *Carroll* v. *United States,* 354 U.S. 394, 405 (1957)). But there is no more reason to view all denials of motions to disqualify counsel as part of a single "category" of orders subject to a uniform rule of appealability than there is to treat all denials of motions to dismiss an indictment as part of a single category. Compare *Abney* v. *United States, supra* (refusal to dismiss indictment on Double Jeopardy grounds appealable) with *United States* v. *MacDonald, supra* (refusal to dismiss indictment on Speedy Trial grounds not appealable). The courts should instead look to the nature of the claim underlying the particular disqualification motion.

[14] Although language in *Cohen* can be read to suggest that the order appealed from must address a significant, unsettled legal question (337 U.S. at 547), and several courts have so interpreted *Cohen* (see, *e.g., Armstrong* v. *McAlpin, supra,* slip op. 3706-3707 & n.11; *In re Corrugated Container Antitrust Litigation,* 611 F.2d 86, 87 (5th Cir. 1980); *Grinnell Corp.* v. *Hackett,* 519 F.2d 595, 597-598 & n.4 (1st Cir.), cert. denied, 423 U.S. 1033 (1975)), decisions by this Court subsequent to *Cohen* have not stressed such a limitation. See

The only injury petitioner suggests it might sustain as a result of respondent's representation of plaintiffs here is that it might be held liable on an intentional tort theory that would not be covered by Home's insurance policy (Pet. Br. 4-5, 37, 44). This alleged injury is, in our view, far too speculative to support an appeal at this stage of the proceedings. There is every possibility, for example, that petitioner will not be found liable at all, or at least not on the intentional tort theory plaintiffs have alleged (along with causes of action sounding in negligence and strict liability).[15] If this were to happen, petitioner's objections would be wholly mooted.

Moreover, we see no reason why petitioner's claim for disqualification, to the extent it has any merit, could not be considered fully on appeal from an adverse judgment finding it liable in intentional tort.[16] If the court of appeals found the intentional tort theory itself to be without legal merit, it could reverse the judgment, thereby mooting petitioner's objection. If the intentional tort theory were found to be valid, it is not clear how peti-

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Abney v. *United States, supra,* 431 U.S. at 658, 660; *United States* v. *MacDonald, supra,* 435 U.S. at 857-858 n.6 (right of appeal not dependent on facts of case, but defined in "categories" of appealable orders). See also *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64, 67 (8th Cir. 1976).

[15] Moreover, if respondent's "highly unusual" theory of intentional tort (Pet. Br. 4) is as groundless as petitioner implies, it can move to dismiss the complaint for failure to state a claim on which relief can be granted or for partial summary judgment. Fed. R. Civ. P. 12(b)(6) and 54(b). In any event, the burden of having to go to trial on a possibly invalid claim is no basis for classifying an order as collateral.

[16] Petitioner asserts (Br. 18) that deferral of the question to appeal from final judgment would not be appropriate because, "[a]s a practical matter, the extent to which the taint complained of has affected the proceedings is likely to be immeasurable." But petitioner makes no effort to explain why this would be so.

tioner could claim on appeal to have been unfairly prejudiced by respondent's assertion of that theory on behalf of his clients. But, in any event, the court of appeals would have before it the entire record in the case and could determine whether respondent has advanced all of his alternative theories of liability—including negligence and strict liability—in the forceful fashion his ethical obligations required. If he did not, the court of appeals could remand for a new trial conducted by new counsel if the court concluded that petitioner were entitled to that relief.[17] A new trial would fully vindicate petitioner's interest.

If petitioner believes after trial that Home has aided respondent in his presentation of the intentional tort theory, it will have a complete remedy in the action it has already filed against Home for breach of fiduciary duty (see page 4, *supra*). This separate action would also be a fully adequate forum in which petitioner could advance its argument that Home's fiduciary duty to petitioner prevented it from giving effective consent to respondent's representation of plaintiffs below (Pet. Br. 39, 42-45). We therefore do not believe the order in this case was appealable pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine.[18]

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[17] Indeed, because the nature of petitioner's claim is related to the manner in which respondent will present the case, it could be argued that the claim is not wholly separate from the merits under the first prong of the collateral order doctrine (compare *United States* v. *MacDonald, supra,* 435 U.S. at 859-860) and that it could be *better* reviewed on appeal from final judgment.

[18] Another consideration weighs against recognizing a right of appeal in these circumstances. Where the motion for disqualification is based on the existence of a prior attorney-client relationship with the attorney (see pages 22-24, *infra*), that relationship constitutes an objective factor on which the right of appeal can be based and provides some assurance that the appeal is not wholly for delay. See *United States* v. *MacDonald, supra,* 435 U.S. at 862-863, comparing

2. Although we do not believe that the order denying disqualification in this case was appealable under 28 U.S.C. 1291, a strong argument can be made that other categories of orders denying disqualification should be appealable under the collateral order doctrine. One such situation is where there is a possibility that confidential information will be used against a former client.

Where an attorney represents a client against another party in a matter that is substantially related to a case in which he previously represented that other party, there is a possibility that he may be able to use confidential information obtained in the course of the prior representation to the detriment of his former client. Courts have uniformly ordered disqualification in such cases. See, *e.g.*, *Musicus* v. *Westinghouse Electric Co.*, No. 79-1067 (5th Cir. July 15, 1980); *Trone* v. *Smith*, No. 77-1832 (9th Cir. June 23, 1980), slip op. 3821; *Church of Scientology of California* v. *McLean*, 615 F.2d 691, 692 (5th Cir. 1980); *General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265, 267 (6th Cir. 1979); *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 195-196 (7th Cir. 1979) (en banc); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977). See ABA *Code of Professional Responsibility*, Canon 4; see also DR 9-101(B); 18 U.S.C. 207 (similar provisions applicable to former government attorneys). The courts will not attempt to determine what confidential information was actually disclosed in the course of the prior representation, because to do so would itself intrude into the attorney-client relationship. See, *e.g.*, *Trone* v. *Smith*, *supra*, slip op. 3822; *Westinghouse Elec. Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); ABA Committee on Professional Ethics, *Formal Opinion 342*, 62 A.B.A.J. 517 & n.6 (1976). A "substantial relationship" between the matters

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Abney v. *United States*, *supra*. No objective factor furnishing such tentative assurance is present here.

is thought to create a sufficient risk of disclosure of confidential information to warrant disqualification.

Arguably an immediate appeal should lie under 28 U.S.C. 1291 where the district court denies a motion to disqualify counsel based on an asserted breach of a prior attorney-client relationship in this fashion, because the court of appeals may not be able effectively to remedy the breach on appeal from a final judgment. Unless a per se rule of reversal were adopted, the court of appeals presumably would not reverse a final judgment against the former client unless it found that the ethical violation actually affected the outcome of the case, such as where the attorney used critical evidence that had been received in the course of the prior representation against the former client. But the former client would be required to disclose the details of the prior representation in order to make such a showing. It was to avoid this very breach of the attorney-client relationship that Courts have adopted the prophylactic rule described above, requiring disqualification wherever there is a "substantial relationship" between the first and second cases.[19] There is no reason why less deference should be owed that relationship on appeal from final judgment.

Second, even if the court of appeals were to reverse the judgment against the former client and order a new trial involving different counsel, this may not be an adequate remedy for the breach of the attorney-client relationship. The opposing party would often still possess confidential information that he could pass on to his

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[19] Difficult questions of proof would arise as well, because the attorney could be expected to argue that he learned the information in the course of representing his second client in the later case, or that the information would have been obtained from the prior client or other sources through discovery in the second case in any event. Issues of derivative use of confidential information would be even more difficult of proof. And, of course, resolution of these issues would require a breach of the attorney's confidential relationship with his second client as well as that with his first.

new attorney. Other persons, not parties to the case, might also have obtained access to confidential information through its disclosure at trial, and this publicity could never be undone.

Finally, the prophylactic rule of disqualification fashioned by the courts of appeals where the attorney may be in the possession of useful confidential information obtained in prior representation is designed to protect against the risk, not merely the actuality, that such information will be disclosed. Cf. *Abney* v. *United States*, *supra*, 431 U.S. at 661. The rule thereby serves to preserve the client's trust in the enduring sanctity of his relationship with his attorney. The injury to that trust and the insecurity of going to trial against a party represented by counsel who possesses damaging confidential information can never be fully remedied by a later reversal of an adverse judgment. Cf. *id.* at 661-662. And, of course, an appeal would never be an effective remedy where the particular case is settled or trial results in a judgment in favor of the party who sought disqualification of the lawyer who previously represented him.

For the foregoing reasons, we believe a reasonable argument can be made that orders denying disqualification where confidential information received in a prior attorney-client relationship may be disclosed should be immediately appealable under 28 U.S.C. 1291. The Court need not address that issue here, however, because, as petitioner concedes (Pet. Br. 4 n.10),[20] no issue of attorney confidences is presented here.[21]

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[20] The district court's order in this case was premised on DR 5-105, which governs simultaneous representation and independence of judgment, not Canon 4, which concerns attorney confidences (Pet. App. 1-5).

[21] Petitioner does assert that *Home* received confidential information regarding these product liability cases and that Home's attorneys discussed strategy in these cases with petitioner's attorneys (Br. 4 n.10; J.A. 104, 218-220; see page 4, *supra*). But because respondent has not represented Home or petitioner in any matters relating to the

We also believe that different considerations, warranting immediate appeal, are present when a question of multiple respresentation arises in a criminal case or before a grand jury. As explained above (see pages 13-18, *supra*), the government's unique posture and responsibilities confer upon it an interest to move for disqualification and to prosecute an appeal in these circumstances that is distinct from and superior to that of private civil litigants. More important for purposes of the appealability question, however, is the fact that the claim for disqualification would be irreparably lost if the government were not allowed a right of immediate appeal.

The failure of a grand jury to indict or its return of no true bill resulting from "stonewalling" by jointly represented witnesses ordinarily would not constitute a final judgment from which an appeal can be taken under 28 U.S.C. 1291. The only means available for the government to obtain review of an order denying a motion to disqualify is therefore an appeal of the disqualification order itself. See *In the Matter of the Special February 1977 Grand Jury*, *supra*, 581 F.2d at 1264. This avenue of appeal is all the more desirable in view of the uncertainty regarding the availability of 28 U.S.C. 1292(b) in the grand jury setting, which turns on whether a grand jury proceeding is a "civil action" for purposes of that provision.[22] Compare *In re April 1977 Grand Jury Sub-*

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instant litigation, Home's possession of confidential information cannot be imputed to respondent. The prophylactic rules of disqualification based on attorney confidences are therefore inapplicable. Moreover, if Home did disclose information pertinent to these cases, petitioner would have a complete remedy in its action for breach of fiduciary duty against Home.

[22] Moreover, given the appropriate limitations on the court of appeals' exercise of its mandamus jurisdiction under 28 U.S.C. 1651 (see *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *Will* v. *United States*, 389 U.S. 90 (1967)) mandamus would not be an adequate remedy in any but the most extraordinary circumstances.

poenas, 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979) (appeal not available), with *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978), and *In the Matter of the Grand Jury Subpoena Served on John Doe*, 546 F.2d 498, 507-502 (2d Cir. 1976) (assuming appeal available, without discussion); see also Note, *Appealability of Orders Relating to Ongoing Grand Jury Proceedings*, 92 Harv. L. Rev. 931 (1979).

Because of the Double Jeopardy Clause, the government also ordinarily has no right of appeal from a judgment of acquittal in a criminal case. It would therefore never have an opportunity to obtain review, after final judgment, of a district court order allowing joint representation that may, for example, have prevented a particular defendant from cooperating with the government. Thus, in contrast to that of a private litigant, the government's appeal would satisfy the third prong of the *Cohen* test.[23]

II

THE COURT OF APPEALS PROPERLY DECLINED TO OVERTURN THE DISTRICT COURT'S ORDER ON THE MERITS

If the Court reaches the merits in this case, we believe the court of appeals properly declined to reverse the district court's order denying petitioner's motion to dis-

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[23] There would remain a question whether a statutory right of appeal would exist because of the possibility that the government's appeal rights in criminal cases are more limited than those of private parties generally. Appeal of a denial of disqualification would not appear to fall within 18 U.S.C. 3731, but there is authority for the proposition that, at least in some circumstances, the government may invoke 28 U.S.C. 1291 as a basis for an appeal even in a criminal case (see *Carroll* v. *United States*, 354 U.S. 394, 403 (1957); *United States* v. *Denson*, 588 F.2d 1112, 1126 (5th Cir. 1979), vacated on other grounds, 603 F.2d 1143 (5th Cir. 1979) (en banc)). We believe the right of appeal under Section 1291 would be clearest in cases satisfying the requisites of the collateral order doctrine.

qualify. In taking this position, however, we express no view on whether it is appropriate under applicable ethical standards for respondent to represent the plaintiffs below, in light of his past relationship with Home or the alleged possibility of such a relationship in the future. For even if respondent has violated these standards, we agree with the view of the Second Circuit in *Armstrong* v. *McAlpin*, *supra*, slip op. 3718-3723, that district courts should not reflexively disqualify counsel whenever a violation of applicable rules of ethics appears.[24]

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[24] The district court in the present case incorporated in its local rules the *Code of Professional Responsibility* adopted by the Supreme Court of Missouri, which, insofar as DR 5-105 is concerned, is patterned after the ABA Code (Pet. App. 2-3). It does not appear that the district court perceived any difference among these provisions (J.A. 153). There is therefore no occasion to consider here whether the applicable rule of decision in a case such as this is a uniform federal rule, a standard incorporated by the district court in its local rules, or adoption of state law. On many issues regarding attorney qualifications and practice in federal court, it is appropriate to follow state law, because the great majority of attorneys practicing before the court would also be members of the bar of the state in which the court sits. Moreover, where, as here, federal jurisdiction is premised on diversity of citizenship, it may be appropriate to look to state law on disqualification questions as well.

In other cases, however, a uniform federal rule is required. Contrary to the reasoning of the Third Circuit in *United States* v. *Miller*, No. 79-2445 (June 26, 1980), slip op. 8-12, for example, we do not believe it is appropriate to look to state law to determine when an attorney formerly employed by the federal government is disqualified under DR 9-101(B) of the *Code of Professional Responsibility*. Rules in this area have the effect of imposing additional terms and conditions on federal employment, an area in which Congress has pervasively regulated. See 18 U.S.C. 207. Differing state rules could upset the delicate balance Congress has struck between the need to protect the government in its litigation

The ABA *Code of Professional Responsibility* was intended to be implemented administratively and to be enforced through disciplinary proceedings brought against the individual attorney. Its various disciplinary rules, including DR 5-105, were not intended to be rigid rules of procedure in civil or criminal cases, slip op. 3723 n.26; Sutton, *How Vulnerable Is the Code of Professional Responsibility?* 57 N.C. L. Rev. 497, 514-516 (1979),[25] although the Code may of course provide useful guidance to a court in passing on procedural matters, such as disqualification motions. Thus, an asserted violation of a disciplinary rule should not inexorably lead to disqualification in a particular case.

Disqualification has an immediate adverse effect on the client by separating him from counsel of his choice. Judicial caution is particularly appropriate because disqualification motions may be interposed for tactical reasons. And even where made in good faith, such motions cause some delay in proceedings. *Armstrong* v. *McAlpin*, *supra*, slip op. 3718-3719, quoting *Board of Education* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). For these reasons, we agree with the Second Circuit that courts should disqualify counsel only "where necessary to preserve the integrity of the adversary process in actions

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and the ability to attract qualified attorneys to government service.

We also believe that uniform federal standards, not adopted state law, must govern the ethical obligations of U.S. Attorneys and defense counsel in federal criminal prosecutions. See, *e.g.*, DR 7-104 (attorney communication with party represented by counsel). In such circumstances, the applicable provision of the ABA Code, presumably reflecting a consensus of the legal profession, may inform the court's judgment, but should not, of course, be dispositive.

[25] The preamble to the Discussion Draft of the Model Rules of Professional Conduct prepared by the ABA's Commission on Evaluation of Professional Standards expressly states that the standards there proposed are designed to be used for disciplinary purposes but not necessarily in collateral judicial proceedings.

before them"—*e.g.*, where an attorney's conflict of interest undermines the court's confidence in the vigor of his representation of his client or where the attorney is at least potentially in a position to use privileged information concerning the other side that was acquired through prior representation. *Ibid.* The present case plainly does not fall in the latter category, and we do not believe that the record at this stage compels the conclusion that respondent will not vigorously represent the plaintiffs in the proceedings below.

We believe it was entirely appropriate for the district court, once a possible ethical violation was called to its attention, to satisfy itself that the plaintiffs below and Home consented to respondent's representation. But in civil litigation such as this, informed consent of the clients to simultaneous representation should ordinarily dispose of a disqualification motion filed by an opposing party who has had no attorney-client relationship with the attorney, absent extraordinary circumstances not present here. See, *e.g.*, *Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197, 1202 (4th Cir. 1978).[26] Because the district court's order declining to disqualify respondent appears to be consistent with the principles just discussed, there is no occasion for the Court to consider whether the court of appeals was correct in apply-

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[26] As we have previously pointed out, disqualification motions filed in criminal cases and grand jury proceedings stand on a different footing because of the strong public interest ingredient in criminal prosecutions, the constitutional rights at stake, the possibility that joint representation will prevent cooperation by defendants and suspects, and the burden on the criminal justice system of retrials. Because of the interests at stake, disqualification of an attorney having conflicting interests would often be appropriate in these cases even where the defendants or witnesses purport to consent to joint representation. *Cuyler* v. *Sullivan*, *supra*, slip op. 11. See page 14, *supra;* see also *In re Gopman*, 531 F.2d 262 (5th Cir. 1976).

ing an "abuse of discretion" standard of appellate review in this case.[27]

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[27] There is some divergence among the courts of appeals regarding the precise standard of appellate review to be applied in attorney disqualification cases. Some courts, like the court below, have announced an abuse of discretion standard, although even these courts do not hesitate to reverse where the district court misperceived the applicable legal standard. See, *e.g.*, *Trone* v. *Smith*, *supra*, slip op. 3822-3823; *Armstrong* v. *McAlpin*, 606 F.2d 28, 34 n.7 (2d Cir. 1979) (panel decision). Other courts have held that, at least where the facts are not in dispute and only legal issues are involved, the district court does not enjoy any particular advantage over appellate courts in the formulation and application of ethical norms and that an abuse of discretion standard of review in such cases is inappropriate. *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, *supra*, 607 F.2d at 188-189 (panel decision); *Aetna Casualty & Surety Co.* v. *United States*, *supra*, 570 F.2d at 1200; *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Kroungold* v. *Triesler*, 521 F.2d 763, 765 n.2 (3d Cir. 1975); *American Roller Co.* v. *Budinger*, 513 F.2d 982, 985 n.3 (3d Cir. 1975). In practice, there may not be much difference between these formulations.

An abuse of discretion standard might well be appropriate in the present case, where resolution of the disqualification motion turned on the district court's largely subjective judgment whether respondent's representation of Home was likely to affect the vigor of his representation of plaintiffs below and where there are no countervailing public policy considerations like those that may arise in a criminal case. The district court's unique familiarity with counsel's performance and predictions about the course of the litigation would necessarily play a significant role in the disqualification decision. In other situations—such as where the attorney's representation may adversely affect a prior client in a substantially related case and that client has *not* given his consent—a more exacting standard of review would be appropriate. In those cases, the usual "clearly erroneous" standard should be applicable on questions of fact, but the appellate court should carefully scrutinize the district court's application

CONCLUSION

The order denying disqualification was not appealable in this case, and the court of appeals properly declined to reverse the district court's order denying disqualification.[28]

Respectfully submitted.

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of controlling standards of disqualification. See, *e.g.*, *Brennan's, Inc.* v. *Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 (5th Cir. 1979).

[28] We do not recommend a particular disposition because we take no position on the question whether the court of appeals properly reached the merits in this case after concluding that orders denying disqualification of counsel are not appealable.

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